5. EMPLOYMENT CASES ~~- ELEMENT AND DAMAGE INSTRUCTIONS~~

Overview

Section 5 contains model ~~elements and damages~~ instructions ~~in~~ for employment discrimination, retaliation, and harassment ~~cases. Currently, this section only addresses "disparate treatment"~~ cases arising under Title VII of the Civil Rights Act of 1964, ~~as amended,~~ 42 U.S.C. § 2000e, ~~to 2000e-17 (1994) ("Title VII");~~ *et seq.*; the Age Discrimination in Employment Act ~~of 1967, as amended,~~ (ADEA), 29 U.S.C. §§ 621~~-634 (1994) ("ADEA");~~ , *et seq.*; 42 U.S.C. § 1981 ~~(1994)~~; ~~and~~ 42 U.S.C. § 1983 ~~(1994)~~; the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*; the Family Medical Leave Act (FMLA), 29 U.S.C. § 2601, *et seq.*; and the Equal Pay Act, 29 U.S.C. § 206(d). It bears emphasis that these are *model* instructions and that the instructions for a particular case must be tailored to the facts and issues presented. This caveat applies to issues such as damages and affirmative defenses, and it applies most importantly to the identification of the proper standard for liability under the specific statute in question.

Background ~~of "Disparate Treatment" Instructions~~

When this project commenced in 1987, ~~the Committee anticipated little difficulty in formulating appropriate model instructions. At that time,~~ Title VII cases were not jury triable~~. *See Harmon v. May Broadcasting Co.*, 583 F.2d 410, 410 (8th Cir. 1978).~~ Moreover, ~~in ADEA~~ cases, ~~the standard for liability clearly appeared to be whether the plaintiff's age was a "determining factor" in the defendant's employment decision.~~ , the ADA and FMLA did not exist, and the standard for liability in ADEA cases was whether the plaintiff's age was a "determining factor" in the challenged employment decision. *See Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985). Over the ~~next four~~ years, ~~however, the applicable law~~ a number of developments have changed ~~dramatically. For example, in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court ruled that 42 U.S.C. § 1981 could not be invoked to address claims of racially-motivated discharges or racial harassment. More significantly,~~ this seemingly simple landscape, including: (1) the United States Supreme Court's distinction between "direct evidence" and "pretext" cases in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)~~, the Supreme Court ruled that different burdens of proof applied in Title VII cases, depending upon the type of evidence offered by the plaintiff: (1) In "pretext" cases, where the plaintiff relied upon "indirect evidence", the Court held that the employee had the burden of proving that unlawful discrimination was a "determining factor" in the challenged employment decision; and (2) in "mixed motive" cases, where the plaintiff relied upon "direct evidence" of discriminatory motivation, the Court ruled that, once the employee established that unlawful bias was a "motivating factor" in the challenged employment decision, the employer had the burden of showing that it would have made the "same decision" in the absence of any unlawful motivation.~~ ; (2) the passage of the ADA, the Civil Rights Act of 1991, and the FMLA, and the ensuing surge in federal court employment litigation; and (3) the Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003), which ruled that the relevant standard for liability in a Title VII discrimination case brought under 42 U.S.C. § 2000e-2(m) is whether the plaintiff's

protected status was a "motivating factor" in the challenged employment decision, regardless of whether the plaintiff is relying on direct or circumstantial evidence.

Although *Costa* makes it clear that the "motivating factor" standard applies in Title VII discrimination cases brought under 42 U.S.C. § 2000e-2(m), the impact of *Costa* in other types of discrimination cases is unclear. On one hand, the *Costa* decision noted that the Civil Rights Act of 1991 expressly legislated the use of a "motivating standard/same decision" format in 42 U.S.C. § 2000e-2(m) discrimination cases,[1] thus leaving the door open for courts to continue applying the *Price Waterhouse* distinction between direct and circumstantial evidence in cases under other employment statutes.[2]

On the other hand, the *Costa* opinion notes that in other kinds of cases, the courts typically do not draw distinctions depending upon whether the plaintiff relies on direct or circumstantial evidence,[3] raising the question of whether the *Price Waterhouse* distinction is still viable. Moreover, even if a single standard should be used in cases under the ADEA and other federal employment statutes, there remains the dilemma of which standard - determining factor, motivating factor/same decision, or something else - should be used.

The distinction between a "determining factor" instruction and "motivating factor/same decision" instruction may appear to be of purely academic interest, but it has great practical significance because of the potentially dispositive difference in the burden of persuasion. A "determining factor" instruction places the burden on the plaintiff to show that he or she would not have been terminated "but for" his or her protected status. However, a "motivating factor/same decision" instruction provides that, if the plaintiff has shown that discrimination was a motivating factor in the challenged employment decision, the ultimate burden is on the defendant to show that it would have made the "same decision" regardless of the plaintiff's protected status. Accordingly, this is an issue that should not be taken lightly.

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[1]See Costa,123 S. Ct. at 2153-54.

[2]See Trammel v. Simmons First Bank of Searcy, 345 F.3d 611 (8th Cir. 2003) (ADEA case discussing potential impact of *Costa* in non-Title VII cases and noting that "[i]n the past we have required direct evidence, which is not present here, to support a mixed-motive claim"); see also Erickson v. Farmland Ind., 271 F.3d 718, 724-25 (8th Cir. 2001) (applying *Price Waterhouse* distinction in ADEA case); Radbaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 448-50 (8th Cir. 1993) (ADEA case discussing what constitutes direct evidence "sufficient to entitle a plaintiff to a *Price Waterhouse* burden-shifting instruction").

[3]See Costa, 123 S. Ct. at 2154 ("The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence.'") (citation omitted).

Employment Cases ~~-- Element and Damage Instructions~~

Recommended Approach

A. Following *Costa*, a motivating factor/same decision instructional format is recommended for all Title VII discrimination cases brought under 42 U.S.C. § 2000e-2(m). *See* Model Instructions 5.01, 5.01A, *infra*.

B. Following the Eighth Circuit's decision in *Pediqo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), the motivating factor/same decision format is recommended for discrimination cases arising under the Americans with Disabilities Act. *See* Model Instructions 5.50 *et seq.*

C. Following the Eighth Circuit's decision in *Prejean v. Warren*, 301 F.3d 893, 900-01 (8th Cir. 2002), the motivating factor/same decision format is recommended for Title VII retaliation cases. *See* Model Instructions 5.60 *et seq.*

D. Following *Mt. Healthy City Bd. Of Ed. V. Doyle*, 429 U.S. 274 (1977), the motivating factor/same decision format is recommended for First Amendment retaliation cases. *See* Model Instructions 5.70 *et seq.*

E. With respect to ADEA discrimination and retaliation cases, the Committee recommends that the "determining factor" standard (Model Instruction 5.11) should be used unless the case law indicates otherwise. *But see Trammel v. Simmons First Bank of Searcy*, 345 F.3d 611 (8th Cir. 2003).

F. With respect to other federal employment statutes, see Model Instructions 5.20 *et seq.* (42 U.S.C. § 1981); 5.25, *et seq.* (42 U.S.C. § 1983); 5.30 *et seq.* (Equal Pay Act); 5.40 *et seq.* (Harassment); 5.50 *et seq.* (ADA); 5.60 *et seq.* (Retaliation); 5.80 *et seq.* (FMLA). In the event the district court wants to cover all bases by eliciting findings under both the "determining factor" and "motivating factor/same decision" standards, a set of special interrogatories is offered at 5.92. *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1059-60 (8th Cir. 2002) (approving use of 5.92 special interrogatories).

~~Although *Price Waterhouse* was a Title VII case, the lower courts began applying this pretext/mixed motive distinction in jury cases. *Compare Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2d Cir. 1989) (instruction erroneously placed burden of proof on employee who relied upon "direct evidence" of statements manifesting bias) *with Lynch v. Belden & Co.*, 882 F.2d 262, 268-69 (7th Cir. 1989) (absent "direct evidence" of discrimination, burden of persuasion rested squarely with plaintiff). Accordingly, in the wake of *Price Waterhouse* and its progeny, the Committee developed alternative essential elements instructions for use in ADEA, § 1981, and § 1983 cases. First, in "indirect evidence" cases, the Committee prepared an instruction in which the plaintiff bore the burden of persuasion on the ultimate question of whether discrimination was a "determining factor" in the challenged employment decision. *See infra* Model Instruction 5.91. Second, in "direct evidence" cases, the Committee drafted an instruction that incorporated the~~

burden-shifting approach announced in *Price Waterhouse*. *See infra* Model Instructions 5.11, 5.21, 5.31.

Practical and Analytical Considerations

Despite its ability to draft separate instructions for "pretext" and "mixed motive" cases, the Committee observed that there would be significant difficulty in deciding how to classify a given case. For example, it was not entirely clear that a plaintiff was entitled to a "mixed motive" instruction merely by testifying as to "direct evidence" of discriminatory motivation. Moreover, the Committee noted that the trial court's choice between a "mixed motive" instruction and a "pretext" instruction would be extremely important because of the potentially dispositive difference in the burdens of persuasion contained in these instructions. Consequently, the Committee formulated a model set of special interrogatories to elicit jury findings under both burdens of proof. *See infra* Model Instruction 5.92.

While these special interrogatories elicited all of the necessary information to permit post-trial analysis under either a "mixed motive" or "pretext" standard, they admittedly were cumbersome and potentially confusing. The Committee also struggled with the logical basis for drawing a distinction between "pretext" and "mixed motive" cases which, in turn, appeared to depend upon the type of evidence offered by the plaintiff.[4] Indeed, in other contexts, the Committee has counseled against the use of instructions that distinguish between direct and circumstantial evidence. *See infra* Model Instruction 1.02.

The practical and logical problems created by the pretext/mixed motive distinction were exacerbated when Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (hereinafter "CRA of 91"). In this statute, Congress authorized jury trials in Title VII cases and,

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[4] By way of illustration, consider the following hypotheticals:

In Case No. 1, an age discrimination plaintiff relies exclusively upon "indirect evidence" that he was terminated for excessive absenteeism while several younger employees with a greater number of absences were not even disciplined by the employer.

In Case No. 2, the plaintiff relies on "direct evidence" by offering disputed testimony that his supervisor referred to his age while dismissing him for excessive absenteeism, while the undisputed evidence also shows that several younger employees with the same number of absences had been similarly dismissed.

Even though the claim in Case No. 2 seems considerably weaker than the claim in Case No. 1, the plaintiff would be entitled to an "easier" burden of proof in Case No. 2, under the pretext/mixed motive distinction. This peculiar result seemed to exemplify the practical and logical problems created by a distinction between direct and indirect evidence.

more importantly from an instructional standpoint, legislatively overruled *Price Waterhouse* by expressly mandating a motivating factor/same decision analytical format. *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-z(m) (1994)). In turn, these legislative changes suggested that there could be further practical difficulties in cases where a race discrimination plaintiff joined a "pretext" claim under section 1981 and a claim under Title VII.

Alternative Approaches in "Disparate Treatment" Cases

Against this background, the Committee identified three choices for the "essential elements" instructions in ADEA, § 1981, and § 1983 cases. First, the Committee considered reverting to the use of a "determining factor" standard in all of these cases. Second, the Committee considered retention of separate essential elements instructions for pretext and mixed motive cases, along with the set of special interrogatories for "borderline" cases. Third, the Committee considered adoption of the motivating factor/same decision format in all cases.

OPEN FOR DISCUSSION

Recommended Approach in "Disparate Treatment" Cases

Ultimately, the Committee decided to endorse the third option--the mixed motive/same decision format--as the preferred method of instructing on the issue of liability in "disparate treatment" cases filed under the ADEA, § 1981 and § 1983.[5] In the Committee's view, this approach has the virtues of uniformity, simplicity and consistency with Title VII cases to which the Civil Rights Act of 1991 applies.[6] In the event the trial court opts to use a "determining factor" instruction or the set of special interrogatories for "borderline" cases, the Committee has retained sample instructions. *See infra* Model Instructions 5.91 ("determining factor" instruction), 5.92 (special interrogatories). It bears emphasis that a proper set of instructions must be tailored for each individual case. *Cf. Brown v. Stites Concrete, Inc.*, 994 F.2d 553, 570 (8th Cir. 1993) (en banc) (Loken, J., dissenting from the panel

[5] Clearly, in Title VII cases, a motivating factor/same decision instructional format is appropriate. *See infra* Model Instructions 5.01, 5.01A.

[6] It bears emphasis that a "motivating factor" finding in a Title VII case establishes the defendant's liability in a Title VII case, while the defendant in an ADEA, § 1981, or § 1983 case may still prevail on the issue of liability if there is a favorable finding on the "same decision" issue.

opinion, which was partially reinstated and published as an appendix to the en banc opinion) (criticizing use of model employment instructions without tailoring them for particular case).

OPEN FOR DISCUSSION

5.01 TITLE VII - DISPARATE TREATMENT - ESSENTIAL ELEMENTS

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's (sex)[2] discrimination claim][3] if all the following elements have been proved by the [(greater weight) (preponderance)][4] of the evidence:

First, defendant [discharged][5] plaintiff; and

Second, plaintiff's (sex) [was a motivating factor][6] [played a part][7] in defendant's decision.

If either of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, your verdict must be for defendant and you need not proceed further in considering this claim. [You may find that plaintiff's (sex) [was a motivating factor] [played a part] in defendant's (decision)[8] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide (sex) discrimination.] [9]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. This instruction is designed for use in a gender discrimination case. It must be modified if the plaintiff is claiming discrimination on the basis of race, religion, or some other prohibited factor.

3. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

4. Select the bracketed language that corresponds to the burden-of-proof instruction given.

5. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

6. The Committee believes that the phrase "motivating factor" should be defined. *See infra* Model Instruction 5.96.

7. *See* Model Instruction 5.96, which defines “motivating factor” in terms of whether the characteristic “played a part or a role” in the defendant’s decision. The phrase “motivating factor” need not be defined if the definition itself is used in the element instruction.

8. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

9. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

This instruction is designed to submit the issue of liability in "disparate treatment" Title VII cases that are subject to the amendments set forth in the Civil Rights Act of 1991. Prior to these amendments, Title VII cases were not jury-triable, *Harmon v. May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978), and the liability standards depended upon whether the case was classified as a "pretext" case or a "mixed motive" case. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Under the Civil Rights Act of 1991, these cases will be triable to a jury, *see* CRA of 91, § 102 (codified at 42 U.S.C. § 1981a(c) (1994)), and, more importantly, the plaintiff prevails on the issue of liability if he or she shows that discrimination was a "motivating factor" in the challenged employment decision. *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-2(m) (1994)). Plaintiffs who prevail on the issue of liability will be eligible for a declaratory judgment and attorney fees; however, they cannot recover actual or punitive damages if the defendant shows that it would have made the same employment decision irrespective of any discriminatory motivation. *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (1994)); *see infra* Model Instruction 5.01A ("same decision" instruction).

It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). *See Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20-21 (8th Cir. 1985) (ADEA case). *See generally Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133, 135 (8th Cir. 1985) (after all of the evidence has been presented, inquiry should focus on ultimate issue of intentional discrimination, not on any particular step in the *McDonnell Douglas* paradigm). Accordingly, this instruction is focused on the ultimate issue of whether the plaintiff's protected characteristic was a "motivating factor" in the defendant's employment decision.

5.01A TITLE VII - DISPARATE TREATMENT - "SAME DECISION" INSTRUCTION

If you find in favor of plaintiff under Instruction ____,[1] then you must answer the following question in the verdict form[s]: Has it been proved by the [(greater weight) (preponderance)][2] of the evidence that defendant [would have discharged][3] plaintiff regardless of [his/her] [sex][4]?

(Note: If you answer this question "yes," plaintiff is not entitled to recover any damages although the court may grant plaintiff other relief. If you answer the question "no," plaintiff will receive any damages you assess pursuant to Instruction No[s]. ___ [and ___].

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote" or "demotion" case, the language within the brackets must be modified.

4. This instruction is designed for use in a gender discrimination case. The language within the brackets must be modified if other forms of discrimination are alleged. The practical effect of a decision in favor of plaintiff under Model Instruction 5.01, *infra*, but in favor of defendant on this question under Title VII, is a judgment for plaintiff and eligibility for an award of attorney fees but no actual damages. The Committee takes no position on whether the judge should advise the jury or allow the attorneys to argue to the jury the effect of a decision in favor of the defendant on the question set out in this instruction.

Committee Comments

If a plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor," the defendant nevertheless may avoid an award of damages or reinstatement by showing that it would have taken the same action "in the absence of the impermissible motivating factor." *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (1994)). This instruction is designed to submit this "same decision" issue to the jury.

5.10 ~~DISPARATE TREATMENT~~ CASES UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA") OF 1967, AS AMENDED

Introductory Comment

The following instructions are designed for use in ~~"disparate treatment" cases brought pursuant to the Age Discrimination in Employment Act. In the interests of simplicity and uniformity, the model instruction on the issue of liability utilizes a motivating-factor/same-decision format for all cases. *See* Introductory Note to Section 5. Nevertheless, if the trial court believes it is appropriate to distinguish between a mixed motive case and a pretext case, Model Instruction 5.91, *infra*, contains a sample pretext instruction. Moreover, if the trial court is inclined to adhere to a pretext/mixed motive distinction but cannot determine how to categorize a particular case, Model Instruction 5.92, *infra*, contains a set of special interrogatories designed to elicit a complete set of findings for post-trial analysis.~~ jury trials under the ADEA.

5.11 ADEA - ~~DISPARATE TREATMENT~~ - ESSENTIAL ELEMENTS ~~(Mixed Motive Case)*~~

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's (age)[2] discrimination claim][~~2~~ 3] if all the following elements have been proved by the [(greater weight) or (preponderance)][~~3~~ 4] of the evidence:

First, defendant [discharged][~~4~~ 5] plaintiff; and

Second, plaintiff's (age) was[6] a ~~motivating~~ determining factor[~~5~~ 7] in defendant's decision.

~~However, your verdict must be for defendant if any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, or if it has been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have [discharged] plaintiff regardless of [his/her] age.~~ If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, your verdict must be for defendant.

"(Age) was a determining factor" only if defendant would not have discharged plaintiff but for plaintiff's (age); it does not require that (age) was the only reason for the decision made by defendant.[8] [You may find (age) was a determining factor if you find defendant's stated reason(s) for its decision(s) [(is) (are)] a pretext to hide [age] discrimination].[9]

Notes on Use

1. Use this phrase if there are multiple defendants.

~~2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.~~

~~3. Select the bracketed language which corresponds to the burden-of-proof instruction given.~~

~~4. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.~~

~~5. The Committee believes that the phrase "motivating factor" should be defined. *See infra* Model Instruction 5.96.~~

2. This instruction is designed for use in an age discrimination case brought pursuant to the ADEA.

3. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

4. Select the bracketed language which corresponds to the burden-of-proof instruction given.

5. This first element is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

6. Historically, cases have approved use of "a determining factor" in ADEA pretext cases. *See Ryther v. KARE 11*, 108 F.3d 832, 846-47 (8th Cir. en banc 1997); *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1060 (8th Cir. 2002) (affirming plaintiff's verdict where instructions used "a" determining factor). However, in *Rockwood Bank v. Gaia*, 170 F.3d 833 (8th Cir. 1999), a panel decision held that "the" determining factor should be used.

7. The Committee recommends the use of "determining factor" in ADEA cases unless case law applies the "motivating factor/same decision" approach in ADEA cases after *Costa*. *See Trammel v. Simmons First Bank of Searcy*, 345 F.3d 611 (8th Cir. 2003) (ADEA case discussing potential impact of *Costa* in non-Title VII cases and noting that "[i]n the past we have required direct evidence, which is not present here, to support a mixed-motive claim"); *see also Erickson v. Farmland Ind.*, 271 F.3d 718, 724-25 (8th Cir. 2001) (applying Price Waterhouse distinction in ADEA case); *Radbaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448-50 (8th Cir. 1993) (ADEA case discussing what constitutes direct evidence "sufficient to entitle a plaintiff to a Price Waterhouse burden-shifting instruction"). If court gives a motivating factor/same decision instruction, *see* Model Instructions 5.91 and 5.92.

8. This definition of the phrase "(age) was a determining factor" is based on *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

9. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

~~* For a pretext case, the format of Model Instruction 5.91, *infra*, is recommended.~~

~~This instruction is designed to submit the issue of liability in "disparate treatment" cases brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994). The burden-shifting analysis used in this instruction had been adopted by the Supreme Court in "mixed motive" cases under both Title VII and 42 U.S.C. § 1983. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977).~~

Moreover, a similar burden-shifting approach has been legislatively adopted in all Title VII cases by virtue of the Civil Rights Act of 1991. *See* Introductory Note to Section 5.

To be sure, there is an important difference between Title VII cases and ADEA cases in the use of this format. In Title VII cases, the plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor" in the challenged employment decision, and a finding that the employer would have made the "same decision" in the absence of any discriminatory motive precludes an award of damages or reinstatement, but does not preclude an award of attorney fees or equitable relief. 42 U.S.C. § 2000e-2(m). It is unclear whether the same result would occur in an age discrimination case. *See Fast v. Southern Union Co., Inc*., 149 F.3d 885, 889 (8th Cir. 1998) and *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999) (same) (citing *Fast*).

At the court's option, a short statement which defines the Age Discrimination in Employment Act may be included at the beginning of this instruction or as a separate instruction. The following language, based on *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985), is recommended:

> Under the Age Discrimination in Employment Act, it is unlawful for an employer to make an employment decision on the basis of an individual's age when that individual is 40 years of age or older.

In *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133 (2000), the Supreme Court held that an age discrimination plaintiff may create a submissible issue by showing that the defendant's stated reason for its decision was pretextual.

5.12A ADEA - ~~DISPARATE TREATMENT -~~ ACTUAL DAMAGES

If you find in favor of plaintiff [under Instruction _____,][1] then you must award plaintiff such sum as you find by the [(greater weight) or (preponderance)][2] of the evidence will fairly and justly compensate plaintiff for any wages and fringe benefits[3] you find plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge], through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by plaintiff during that time.[3]

[You are also instructed that plaintiff has a duty under the law to "mitigate" [his/her] damages--that is, ~~to exercise reasonable diligence under the circumstances~~ to minimize [his/her] damages. Therefore, if you find by the [(greater weight) or (preponderance)] of the evidence, that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [him/her], you must reduce [his/her] damages by the amount of the wages and fringe benefits [he/she] reasonably would have earned if [he/she] had sought out or taken advantage of such an opportunity.][4]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][5]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. ~~When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th Cir. 1981); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *See Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985). The Committee expresses no view as~~

to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law. This is the formula for "back pay" i.e., is "the difference between the value of compensation the plaintiff would have been entitled to had he remained employed by the defendant and whatever wages he earned during the relevant period." *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1062 (8th Cir. 2002). The value of lost benefits, such as employer-subsidized health, life, disability and other forms of insurance, contributions to retirement, accrued vacation, etc. are recoverable under the ADEA. *Hartley*, 310 F.3d at 1062 (collecting cases); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110-1114 (8th "Cir. 1994) (allowing insurance replacement costs, lost 401(K) contributions). This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

4. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983). *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061-62 (8th Cir. 2002). The burden is on the employer to show plaintiff's failure to mitigate. *Id*.

5. This paragraph may be given at the trial court's discretion.

Committee Comments

The goal of a damages award in an age discrimination case is to put the plaintiff in the same economic position he/she would have been in but for the unlawful employment decision. This instruction is designed to submit the standard back pay formula of lost wages and benefits *minus* interim earnings and benefits through the date of verdict. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982). *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061-62 (8th Cir. 2002) (plaintiff entitled to "most complete relief possible"); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110-14 (8th Cir. 1994).

This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). U *Gaworski*, 17 F.3d at 1110-14. However, unemployment compensation, Social Security benefits, and pension benefits ordinarily received by plaintiff are considered "collateral source" benefits that are not offset against a back pay award. *See Hartley*, 310 F.3d at 1062; *Doyne v. Union Electric Co.*, 953 F.2d 447, 451-52 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 627 (6th Cir. 1983) (same). *But cf. Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of

unemployment compensation is within trial court's discretion); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same) *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110-14 (8th Cir. 1994) (unemployment benefits, moonlighting income also not deductible).

In some cases, a discrimination plaintiff may be eligible for future lost income and benefits ("front pay"). *Hartley*, 310 F.3d 1062-63. Because front pay is essentially an equitable remedy "in lieu of" reinstatement," front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507, 511 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction which submits this issue in more direct terms.

~~5.13~~ 5.12B ADEA ~~- DISPARATE TREATMENT -~~ NOMINAL DAMAGES

[Nominal damages normally are not ~~allowed~~ appropriate in ADEA ~~disparate treatment~~ cases.][1]

Notes on Use

1. If a nominal damages instruction is deemed appropriate, *see* Model Instruction 5.02A.

Committee Comments

Recoverable damages in ADEA cases normally are limited to lost wages and benefits and in most ADEA cases, it will be undisputed that plaintiff has some actual damages. Although case law does not clearly authorize this remedy in age discrimination cases, a nominal damage instruction may be considered in appropriate cases, and 5.02A should be used. Most cases that allow nominal damages just assume they are permissible without much discussion of the issue. *See e.g., Drez v. E.R. Squibb & Sons, Inc.*, 674 F. Supp. 1432, 1438 (D. Kan. 1987) (ADEA); *Graefenhain v. Pabst Brewing Co.*, 670 F. Supp. 1415, 1416 (E.D. Wis. 1987) (ADEA). ~~For example, if the plaintiff was given six months severance pay and failed to secure subsequent employment during that period, the jury may find that an award of actual damages would be inappropriate because of the plaintiff's "failure to mitigate."~~

~~In an "age harassment" case where the plaintiff claims that he or she was transferred to a less desirable position, but admits there was no loss in pay or benefits, the primary remedy at stake would be an injunction returning the plaintiff to his or her prior position. Similarly, in a discharge cases in which it is undisputed that the plaintiff suffered no actual damages, because he or she was able to secure immediately a better paying job, the primary remedy at stake would be reinstatement. Given the "equitable" nature of injunctive relief and reinstatement, these relatively rare cases should not be tried to a jury since there is no claim for legal relief. *See generally EEOC v. Emory Univ.*, 47 Fair Empl. Prac. Cas. (BNA) 1770, 1771, 1998 WL 156247 at *2 (N.D. Ga. 1988); *McLaren v. Emory Univ.*, 705 F. Supp. 563, 568 (N.D. Ga. 1988). Most cases that allow nominal damages just assume they are permissible without much discussion of the issue. *See e.g., Drez v. E.R. Squibb & Sons, Inc.*, 674 F. Supp. 1432, 1438 (D. Kan. 1987) (ADEA); *Graefenhain v. Pabst Brewing Co.*, 670 F. Supp. 1415, 1416 (E.D. Wis. 1987) (ADEA).~~

~~If nominal damages are submitted, the verdict form must permit the jury to make that finding.~~

~~5.14~~ 5.12C ADEA - ~~DISPARATE TREATMENT -~~ WILLFULNESS

If you find in favor of plaintiff under Instruction _____,[1] then you must decide whether the conduct of defendant was "willful." You must find defendant's conduct was willful if you find by the [(greater weight) or (preponderance)][2] of the evidence that, when defendant [discharged][3] plaintiff, defendant knew [the discharge] was in violation of the federal law prohibiting age discrimination, or acted with reckless disregard of that law.

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. Select the bracketed language which corresponds to the burden-of-proof instruction given.

3. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, or where the plaintiff resigned but claims he was "constructively discharged," the instruction must be modified.

Committee Comments

The standard set forth in the instruction is consistent with that mandated by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). *See also Spencer v. Stuart Hall Co., Inc.*, 173 F.3d 1124 (8th Cir. 1999). For a discussion of the evidence necessary to justify a submission on the issue of wilfulness, *see Maschka v. Genuine Parts Co.*, 122 F.3d 566 (8th Cir. 1997); ~~and~~ *Spencer v. Stuart Hall Co., Inc.*, 173 F.3d 1124 (8th Cir. 1999); *Hartley v. Dillard's, Inc.*, 310 F.3d 1054 (8th Cir. 2002).

~~5.15~~ 5.13 ADEA - ~~DISPARATE TREATMENT -~~ VERDICT FORM

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On the [age discrimination][1] claim of plaintiff [John Doe], [as submitted in Instruction _____][2], we find in favor of

_____

(Plaintiff John Doe) or (Defendant XYZ, Inc.)

Note: Complete the following paragraphs only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's damages to be:

$_____ (stating the amount or, if none, write the word "none").[3]

Was defendant's conduct "willful" as that term is defined in Instruction _____?[4]

Yes _____ No _____

(Place an "X" in the appropriate space.)

_____

Foreperson

Dated: _____

Notes on Use

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

2. The number or title of the "essential elements" instruction should be inserted here.

3. This paragraph must be modified if the issue of nominal damages is submitted. *But see infra* Committee Comments, Model Instruction ~~5.13~~ 5.12A.

4. The number or title of the instruction defining "willfulness" should be inserted ~~here~~. *See infra* Model Instruction ~~5.14~~ 5.12C.

5.14 - 5.19 RESERVED FOR FUTURE USE

5.20 RACE DISCRIMINATION CASES UNDER 42 U.S.C. § 1981

Introductory Comment

Section 1981 of Title 42, United States Code, which prohibits race discrimination in the making and enforcement of contracts, provides a cause of action for race discrimination in employment claims. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *see also Swapshire v. Baer*, 865 F.2d 948 (8th Cir. 1989). Race discrimination claimants often join claims under § 1981 with claims under Title VII because § 1981, unlike Title VII, does not limit the recovery of compensatory and punitive damages. If the plaintiff joins a jury-triable claim under Title VII with a § 1981 claim, the Committee recommends the use of the 5.01 series of instructions and accompanying verdict form. Although there is a distinction between Title VII and § 1981 in terms of the threshold for liability, the 5.01 series of instructions will yield all of the required findings for a § 1981 case.

In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court restricted the applicability of § 1981 in the employment context to claims arising out of the formation of the employment relationship--in other words, hiring claims and some types of promotion claims. *See Foster v. University of Arkansas*, 938 F.2d 111, 113 (8th Cir. 1991); *Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947 (8th Cir. 1991). However, *Patterson* was legislatively overruled by the Civil Rights Act of 1991, which expressly provides that discharge and harassment claims may be brought under § 1981. In *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992), the Eighth Circuit held that section 101 of the 1991 amendments (overruling *Patterson*), did not apply retroactively to cases pending at the time of their enactment. *See also Huey v. Sullivan*, 971 F.2d 1362 (8th Cir. 1992) (holding that section 114 of the 1991 Act authorizing interest on back pay, and section 113 allowing shifting of expert witness fees, are not retroactive), *cert. denied*, 511 U.S. 1068 (1994).

The following instructions are designed for use in all cases brought pursuant to 42 U.S.C. § 1981. In the interests of simplicity and uniformity, the model instruction on the issue of liability utilizes a motivating-factor/same-decision format for all cases. *See* Introductory Note to Section 5. Nevertheless, if the trial court believes it is appropriate to distinguish between a mixed motive case and a pretext case, Model Instruction 5.91, *infra*, contains a sample pretext instruction. Moreover, if the trial court is inclined to adhere to a pretext/mixed motive distinction but cannot determine how to categorize a particular case, Model Instruction 5.92, *infra*, contains a set of special interrogatories designed to elicit a complete set of findings for post-trial analysis.

5.21 42 U.S.C. § 1981 - RACE DISCRIMINATION - ESSENTIAL ELEMENTS (Mixed Motive Case)*

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's race discrimination claim][2] if all the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, defendant [failed to hire][4] plaintiff; and

Second, plaintiff's race [was a motivating factor][5] [played a part][6] in defendant's decision.

However, your verdict must be for defendant if any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, or if it has been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have decided not to [hire] plaintiff regardless of [his/her] race. [You may find that plaintiff's race [was a motivating factor] [played a part] in defendant's (decision)[7] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide race discrimination.] [8]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

4. This instruction is designed for use in a "failure to hire" case. In a discharge or "failure to promote" case, the instruction must be modified. In "constructive discharge" cases, *see infra* Model Instruction 5.93.

5. The Committee believes that the phrase "motivating factor" should be defined. *See infra* Model Instruction 5.96.

6. *See* Model Instruction 5.96, which defines “motivating factor” in terms of whether the characteristic “played a part or a role” in the defendant’s decision. The phrase “motivating factor” need not be defined if the definition itself is used in the element instruction.

7. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

8. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

* For a pretext case, the format of Model Instruction 5.91, *infra*, is recommended.

To prevail under section 1981, the plaintiff must establish intentional race discrimination. *Swapshire v. Baer*, 865 F.2d 948, 952 (8th Cir. 1989) (citing *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982)). Consistent with its approach in age discrimination cases, the Committee recommends the use of a motivating-factor/same-decision instruction in all mixed motive section 1981 cases. *See infra* Introductory Note to Section 5; Committee Comments, Model Instruction 5.11. Under this approach, the jury must determine whether discrimination was a causal factor in the challenged employment decision, although the risk of nonpersuasion on this issue ultimately rests with the defendant.

5.22A 42 U.S.C. § 1981 - RACE DISCRIMINATION - ACTUAL DAMAGES

If you find in favor of plaintiff [under Instruction _____][1], then you must award plaintiff such sum as you find by the [(greater weight) or (preponderance)][2] of the evidence will fairly and justly compensate [him/her] for damages you find [he/she] sustained as a direct result of defendant's conduct as described in Instruction _____.[1] Damages include wages or fringe benefits you find plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on (fill in date of discharge), through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by plaintiff during that time.][3] Damages also may include [list damages supported by the evidence].[4]

[You are also instructed that plaintiff has a duty under the law to "mitigate" [his/her] damages--that is, to exercise reasonable diligence under the circumstances to minimize [his/her] damages. Therefore, if you find by the [(greater weight) or (preponderance)] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [him/her], you must reduce [his/her] damages by the amount of the wages and fringe benefits plaintiff reasonably could have earned if [he/she] had sought out or taken advantage of such an opportunity.][5]

[Remember, throughout your deliberations, you must not engage in any speculations, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][6]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. Select the bracketed language which corresponds to the burden-of-proof instruction given.

3. When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th Cir. 1981), *overruled on other grounds*, 860 F.2d 834 (7th Cir. 1988); *Pearce v. Carrier Corp.*, 966 F.2d 958

(5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *Fariss*, 769 F.2d at 964-65. The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

4. In section 1981 cases, a prevailing plaintiff may recover damages for mental anguish, damage to reputation, or other personal injuries. *See Wilmington v. J.I. Case Co.*, 793 F.2d 909, 921 (8th Cir. 1986). The specific elements of damages set forth in this instruction are similar to those found in the Civil Rights Act of 1991. *See* 42 U.S.C. § 1977A(b)(3). *See infra* Model Instruction 5.02 n.8.

5. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

6. This paragraph may be given at the trial court's discretion.

Committee Comments

This instruction is designed to submit the standard back pay formula of lost wages and benefits *minus* interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982). Moreover, because § 1981 is open-ended in the types of damages which may be recovered, this instruction also permits the recovery of general damages for pain, suffering, humiliation, and the like. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989). Unlike Title VII cases under the Civil Rights Act of 1991, there is no "cap" on damages under section 1981.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy “in lieu of” reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury’s determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Indus.*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible), *cert. denied*, 480 U.S. 906 (1987); *Protos v.*

Volkswagen of America, Inc., 797 F.2d 129, 138-39 (3d Cir.) (unemployment benefits not deductible), *cert. denied*, 479 U.S. 972 (1986); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same), *cert. denied*, 466 U.S. 950 (1984). *But cf. Blum v. Witco Chemical Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion), *cert. denied*, 495 U.S. 948 (1990); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same), *cert. denied*, 430 U.S. 911 (1977).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction which submits this issue in more direct terms.

~~5.23~~ 5.22B 42 U.S.C. § 1981 - RACE DISCRIMINATION - NOMINAL DAMAGES

If you find in favor of plaintiff under Instruction _____[1], but you do not find that plaintiff's damages have ~~no~~ monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar ($1.00).[2]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. One Dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some cases, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

If nominal damages are submitted, the verdict form must contain a line where the jury can make that finding.

An award of nominal damages can support a punitive damage award. *See Goodwin v. Circuit Court of St. Louis County,* 729 F.2d 541, 548 (8th Cir. 1984) (§ 1983 case).

~~5.24~~ 5.22C 42 U.S.C. § 1981 - RACE DISCRIMINATION - PUNITIVE DAMAGES

In addition to actual damages, the law permits the jury under certain circumstances to award the injured person punitive damages in order to punish the defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

If you find in favor of plaintiff and against defendant [name], [and if you find by the [(greater weight) or (preponderance)][1] of the evidence that plaintiff's firing was motivated by evil motive or intent, or that defendant was callously indifferent to plaintiff's rights,][2] then, in addition to any other damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or deter the defendant and others from like conduct in the future. Whether to award plaintiff punitive damages and the amount of those damages are within your sound discretion.

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.][3]

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given.

2. Because a finding of liability necessarily entails a finding of "intentional discrimination," *see Swapshire v. Baer*, 865 F.2d 948, 952 (8th Cir. 1989), a substantial argument can be made that no additional finding should be required before the jury may consider the issue of punitive damages. *See Smith v. Wade*, 461 U.S. 30 (1983). Nevertheless, the court may want to submit the bracketed language to emphasize the extraordinary nature of punitive damages. *See Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489-90 (4th Cir.) (indicating that not every section 1981 claim "calls for submission of this extraordinary remedy to the jury"), *cert. denied*, 488 U.S. 996 (1988). The optional language is derived from *Smith v. Wade*. *See also Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1181 (10th Cir. 1989) (punitive damages recoverable only if discrimination was "malicious, willful, and [sic] in gross disregard of [plaintiff's] rights"); *Stephens*, 848 F.2d at 489-90 (requiring malice, evil intent, or callous indifference); *Beauford v. Sisters of Mercy-Province, Inc.*, 816 F.2d 1104, 1108-09 (6th Cir.) (requiring malice, evil intent, or callous, reckless or egregious disregard of plaintiff's rights), *cert. denied*, 484 U.S. 913 (1987).

3. Use this language if there are multiple defendants.

Employment Cases ~~-- Element and Damage Instructions~~

Committee Comments

Punitive damages are recoverable in section 1981 actions. *Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 921-22 (8th Cir. 1986). *See infra* Model Instruction 4.53, for additional comments on punitive damages and factors that may be considered. The Committee is considering whether this instruction should be revised in light of *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996).

~~5.25~~ 5.23 42 U.S.C. § 1981 - RACE DISCRIMINATION - VERDICT FORM

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On the [race discrimination][1] claim of plaintiff [John Doe], as submitted in Instruction _____[2], we find in favor of

_____

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

Note: Complete the following paragraphs only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's damages as defined in Instruction _____[3] to be:

$_____ (stating the amount or, if none, write the word "none")[4] (stating the amount, or if you find that plaintiff's damages have no monetary value, set forth a nominal amount such as $1.00).[5]

We assess punitive damages against defendant (name), as submitted in Instruction _____,[6] as follows:

$_____ (stating the amount or, if none, write the word "none").

_____

Foreperson

Dated: _____

Notes on Use

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

2. The number or title of the "essential elements" instruction should be inserted here.

3. The number or title of the "actual damages" instruction should be inserted here.

4. Use this phrase if the jury has not been instructed on nominal damages.

5. Include this paragraph if the jury is instructed on nominal damages.

6. The number or title of the "punitive damages" instruction should be inserted here.

~~5.30~~ 5.25 DISCRIMINATION BY PUBLIC EMPLOYERS UNDER 42 U.S.C. § 1983

Introductory Comment

Discrimination claims against public employers are often brought under 42 U.S.C. § 1983 as well as Title VII. *E.g.*, *Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227 (8th Cir. 1987); *Hervey v. City of Little Rock*, 787 F.2d 1223 (8th Cir. 1986). Section 1983 historically included three components which Title VII did not contain: (1) the right to a jury trial; (2) the availability of general damages for humiliation, loss of reputation, and the like; and (3) the availability of punitive damages against individual defendants. Although the Civil Rights Act of 1991 has eliminated these differences, § 1983 claims will remain distinctive in two respects: (1) § 1983 does not require exhaustion of the EEOC administrative process; and (2) § 1983 does not place a cap on compensatory and punitive damages. The theory of liability in a § 1983 discrimination claim is that discrimination on the basis of race, gender, or religion constitutes a deprivation of equal protection and, thus, violates the Fourteenth Amendment. The Committee expresses no position on the issue of whether discrimination on the basis of age or disability is within the purview of § 1983.

The following instructions are designed for use in all discrimination cases brought pursuant to 42 U.S.C. § 1983. In the interests of simplicity and uniformity, the model instruction on the issue of liability utilizes a motivating-factor/same-decision format for all cases. *See* Introductory Note to Section 5. Nevertheless, if the trial court believes it is appropriate to distinguish between a mixed motive case and a pretext case, Model Instruction 5.91, *infra*, contains a sample pretext instruction. Moreover, if the trial court is inclined to adhere to a pretext/mixed motive distinction but cannot determine how to categorize a particular case, Model Instruction 5.92, *infra*, contains a set of special interrogatories designed to elicit a complete set of findings for post-trial analysis.

~~5.31~~ 5.26 42 U.S.C. § 1983 - ESSENTIAL ELEMENTS (Mixed Motive Case)*

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's (sex)[2] discrimination claim][3] if both of the following elements have been proved by the [(greater weight) or (preponderance)][4] of the evidence:

First, defendant [discharged][5] plaintiff; and

Second, plaintiff's (sex) [was a motivating factor][6] [played a part][7] in defendant's decision[; and

Third, defendant was acting under color of state law].~~7~~[8]

However, your verdict must be for defendant if any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, or if it has been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have [discharged] plaintiff regardless of [his/her] (sex). [You may find that plaintiff's (sex) [was a motivating factor] [play a part] in defendant's (decision)[9] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] ~~not the true reason(s), but [(is) (are)]~~ a pretext to hide (sex) discrimination.] [10]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. This instruction is designed for use in a gender discrimination case. It must be modified if the plaintiff is claiming discrimination on the basis of race, religion, or other unlawful basis.

3. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

4. Select the bracketed language which corresponds to the burden-of-proof instruction given.

5. This instruction is designed for use in a discharge case. In a "failure to hire" "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

6. The Committee believes that the phrase "motivating factor" should be defined. *See infra* Model Instruction 5.96.

7. *See* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

~~7~~ 8. Use this language if the issue of whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction.

9. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

10. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

* For a pretext case, the format of Model Instruction 5.91, *infra*, is recommended.

To prevail on a section 1983 discrimination claim, the plaintiff must prove intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 240 (1976). This intent to discriminate must be a causal factor in the defendant's employment decision. *Tyler v. Hot Springs School Dist. No. 6*, 827 F.2d 1227, 1230-31 (8th Cir. 1987). Consistent with its approach in age discrimination and race discrimination cases, the Committee recommends the use of a motivating-factor/same-decision instruction in § 1983 cases. *See infra* Introductory Note to Section 5; Committee Comments, Model Instructions 5.11, 5.21, *infra*; *see generally Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 282-87 (1977).

~~5.32~~ 5.27A 42 U.S.C. § 1983 - ACTUAL DAMAGES

If you find in favor of plaintiff under Instruction _____,[1] then you must award plaintiff such sum as you find by the [(greater weight) or (preponderance)][2] of the evidence will fairly and justly compensate plaintiff for any actual damages you find plaintiff sustained as a direct result of defendant's conduct as submitted in Instruction _____.[3] Actual damages include any wages or fringe benefits you find plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge], through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by plaintiff during that time.[4] Actual damages also may include [list damages supported by the evidence].[5]

[You are also instructed that plaintiff has a duty under the law to "mitigate" his damages--that is, to exercise reasonable diligence under the circumstances to minimize his damages. Therefore, if you find by the [(greater weight) or (preponderance)] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to him, you must reduce his damages by the amount he reasonably could have avoided if he had sought out or taken advantage of such an opportunity.][6] [Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][7]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. Select the bracketed language which corresponds to the burden-of-proof instruction given.

3. When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th Cir. 1981); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the

amount the employer would have paid as premiums on the employee's behalf. *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

4. This sentence should be used to guide the jury in calculating the plaintiff's economic damages. In section 1983 cases, however, a prevailing plaintiff may recover actual damages for emotional distress and other personal injuries. *See Carey v. Piphus*, 435 U.S. 247 (1978).

5. In section 1983 cases, a prevailing plaintiff may recover damages for mental anguish and other personal injuries. The specific elements of damages that may be set forth in this instruction are similar to those found in the Civil Rights Act of 1991. *See* 42 U.S.C. § 1981a(b)(3). *See infra* Model Instructions 5.02 n.8, and 4.51.

6. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

7. This paragraph may be given at the trial court's discretion.

Committee Comments

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982). Moreover, because § 1983 damages are not limited to back pay, the instruction also permits the recovery of general damages for pain, suffering, humiliation, and the like.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy “in lieu of” reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury’s determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Indus.*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Elec. Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security

and pension benefits not deductible); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same). *But cf. Blum v. Witco Chem. Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction which submits this issue in more direct terms.

~~5.33~~ 5.27B 42 U.S.C. § 1983 - NOMINAL DAMAGES

If you find in favor of plaintiff under Instruction _____[1], but you do not find that plaintiff's damages have ~~no~~ monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar ($1.00).[2]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. One Dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

Committee Comments

Most employment discrimination cases involve lost wages and benefits. Nevertheless, a nominal damage instruction should be given in appropriate cases, such as where a plaintiff claiming a discriminatory harassment did not sustain any loss of earnings. *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 542-43, 548 (8th Cir. 1984).

An award of nominal damages can support a punitive damage award. *See Goodwin*, 729 F.2d at 548.

If nominal damages are submitted, the verdict form must contain a line where the jury can make that finding.

~~5.34~~ 5.27C 42 U.S.C. § 1983 - PUNITIVE DAMAGES

In addition to actual damages, the law permits the jury under certain circumstances to award the injured person punitive damages in order to punish the defendant[1] for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

If you find in favor of plaintiff and against defendant (name), [and if you find by the [(greater weight) or (preponderance)][2] of the evidence that plaintiff's firing was motivated by evil motive or intent, or that defendant was callously indifferent to plaintiff's rights],[3] then in addition to any damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or to deter defendant and others from like conduct in the future. Whether to award plaintiff punitive damages, and the amount of those damages are within your discretion.

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed such defendants may be the same or they may be different.][4]

Notes on Use

1. Public entities, such as cities, cannot be sued for punitive damages under section 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Consequently, the target of a punitive damage claim must be an individual defendant, sued in his individual capacity.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. *See infra* Model Instruction 5.24 n.2.

4. The bracketed language is available for use if punitive damage claims are submitted against more than one defendant.

Committee Comments

Punitive damages are recoverable under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30 (1983). The Committee is considering whether this instruction should be revised in light of *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996).

~~5.35~~ 5.28 42 U.S.C. § 1983 - VERDICT FORM

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On the [(sex)[1] discrimination][2] claim of plaintiff [John Doe], as submitted in Instruction _____[3], we find in favor of

_____

(Plaintiff John Doe) or (Defendant Sam Smith)

Note: Complete the following paragraphs only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's (name) damages as defined in Instruction ____[4] to be:

$_____ (stating the amount or, if none, write the word "none")[5] (stating the amount, or if you find that plaintiff's damages have no monetary value, set forth a nominal amount such as $1.00).[6]

We assess punitive damages against defendant (name), as submitted in Instruction _____,[7] as follows:

$_____ (stating the amount or, if none, write the word "none").

_____

Foreperson

Dated: _____

Notes on Use

1. This verdict form is designed for use in a gender discrimination claim. It must be modified if the plaintiff is claiming a different form of discrimination.

2. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

3. The number or title of the "essential elements" instruction should be inserted here.
4. The number or title of the "actual damages" instruction should be inserted here.
5. Use this phrase if the jury has not been instructed on nominal damages.
6. Include this paragraph if the jury is instructed on nominal damages.
7. The number or title of the "punitive damages" instruction should be inserted here.

5.30 EQUAL PAY ACT

Introductory Comment

The Equal Pay Act, 29 U.S.C. § 206(d), with certain exceptions, prohibits employers from discriminating against employees on the basis of sex with respect to wages paid for equal work performed under similar working conditions. The Equal Pay Act, which is part of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, provides:

> No employer having employees subject to [the minimum wage provisions of the Fair Labor Standards Act] shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d)(1).

~~To establish a violation under the Equal Pay Act, a plaintiff must prove that (1) he or she was paid less than one or more members of the opposite sex employed in the same establishment, (2) for equal work on jobs requiring equal skill, effort, and responsibility, (3) which were performed under similar working conditions. *See Hunt v. Nebraska Pub. Power Dist.*, 282 F.3d 1021, 1029 (8th Cir. 2002); *see also EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992). Once the plaintiff has met his or her burden, the defendant employer may avoid liability only by proving that the disparity in pay was based on a bona fide seniority system, a merit system, a system which measures earnings by quantity or quality of production, or any other factor other than sex. *See Hutchins v. Int'l Bhd. of Teamsters*, 177 F.3d 1076, 1081 (8th Cir. 1999).~~

The following instructions are designed for use in cases brought pursuant to the Equal Pay Act. It is important to note that a plaintiff may bring a federal claim for wage discrimination on the basis of sex under either the Equal Pay Act or Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e *et seq*. *See Simmons v. New Pub. Sch. Dist. No. 8*, 251 F.3d 1210, 1215 (8th Cir. 2001); *Delight*, 973 F.2d at 669. To the extent a plaintiff is claiming wage discrimination under Title VII, these instructions should not be used.

5.31 EQUAL PAY ACT – ESSENTIAL ELEMENTS

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's Equal Pay Act claim][2] if all of the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, defendant employed plaintiff and one or more members of the opposite sex in positions requiring substantially equal skill, effort, and responsibility (as defined in Instructions __-__);[4] and

Second, plaintiff and one or more members of the opposite sex performed their positions under similar working conditions (as defined in Instruction ___);[5] and

Third, plaintiff was paid a lower wage than [the][6] member[s][6] of the opposite sex who [(was) (were)][6] performing substantially equal work under similar working conditions.

If any of the above elements has not been proved by the [(greater weight) or (preponderance)][3] of the evidence, or if it has been proved by the [(greater weight) or (preponderance)] of the evidence that the difference in pay was based on (describe affirmative defense(s) raised by the evidence), your verdict must be for defendant and you need not proceed further in considering this claim.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Use this phrase if there are multiple claims.

3. Select the language that corresponds to the burden-of-proof instruction.

4. Insert the numbers of the Instructions defining "substantially equal," "skill," "effort," and "responsibility."

5. Insert the number of the Instruction defining "similar working conditions."

6. Select the proper singular or plural form.

Committee Comments

To establish a violation under the Act, a plaintiff must prove that the defendant paid different wages to employees of different sexes for "equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions." *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992) (quoting *Corning Glass Works v.*

Brennan, 417 U.S. 188, 195 (1974); *see Hunt v. Nebraska Pub. Power Dist.*, 282 F.3d 1021, 1029 (8th Cir. 2002) (holding plaintiff must prove that (1) he or she was paid less than one or more members of the opposite sex employed in the same establishment, (2) for equal work on jobs requiring equal skill, effort, and responsibility, (3) which were performed under similar working conditions).

Once plaintiff has met his or her burden, the employer may avoid liability only by proving that the disparity in pay was based on a bona fide seniority system, a merit system, a system which measures earnings by quantity or quality of production, any other factor other than sex. *See Hutchins v. Int'l Bhd. of Teamsters*, 177 F.3d 1076, 1081 (8th Cir. 1999).

5.32 EQUAL PAY ACT – DEFINITION: "SUBSTANTIALLY EQUAL"

"Substantially equal" does not mean identical. In considering whether two jobs are substantially equal, you should compare the skill, effort, and responsibility required in performing the jobs. You should consider the actual job requirements, as opposed to job classifications, job descriptions, or job titles. In addition, you should consider the jobs overall, as opposed to individual segments of the jobs. You may disregard any minor or insubstantial differences in the skill, effort, and responsibility required to perform the jobs.

Committee Comments

Determining whether two jobs are substantially equal requires "practical judgment on the basis of all the facts and circumstances of a particular case." *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 719 (8th Cir. 2000). A plaintiff is not required to show that the jobs are identical. *See Ridgway v. United Hospitals-Miller Division*, 563 F.2d 923, 926 (8th Cir. 1977); *Orahood v. Board of Trustees of the Univ. of Arkansas*, 645 F.2d 651, 654 (8th Cir. 1981). Comparability, however, is not enough. *See Christopher v. Iowa*, 559 F.2d 1135, 1138 (8th Cir. 1977). The inquiry centers around "whether the performance of the jobs requires substantially equal skill, effort and responsibility under similar working conditions." *Orahood*, 645 F.2d at 654. This may involve a comparison of the seniority and background experience of the employees performing the jobs, *see Buettner*, 216 F.3d at 719, and a comparison of the predecessor and successor employees to the jobs (both immediate and non-immediate), *see Broadus v. O.K. Indus.*, 226 F.3d 937, 942 (8th Cir. 2000). The actual job requirements and performance, as opposed to the job classifications or titles, are to be considered. *See Hunt v. Nebraska Pub. Power Dist.*, 282 F.3d 1021, 1029 (8th Cir. 2002) (citing *Orahood*, 645 F.2d at 654). Moreover, the overall jobs, and not merely the individual segments of the jobs, are to be considered. *See Broadus*, 226 F.3d at 942. Two jobs requiring an insubstantial or minor difference in the degree or amount of skill, or effort, or responsibility may be "substantially equal." *See Hunt*, 282 F.3d at 1030.

5.33 EQUAL PAY ACT – DEFINITION: "SKILL"

"Skill" refers to factors such as the level of experience, training, education, and ability necessary to meet the performance requirements of a job.

Committee Comments

Skill includes factors such as experience, training, education, and ability. *See Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 719 (8th Cir. 2000). "The crucial question under the Equal Pay Act is not whether one sex possesses additional training or skills, but whether the nature of the duties actually performed require or utilize those additional skills." *Peltier v. City of Fargo*, 533 F.2d 374, 377 (8th Cir. 1976) (citing 29 C.F.R. § 800.125, .126).

5.34 EQUAL PAY ACT – DEFINITION: "EFFORT"

"Effort" refers to factors such as the amount of mental or physical exertion needed for performing a job. In determining the "effort" required by a job, you should consider duties or other job factors that cause mental or physical fatigue or stress, as well as duties or other job factors that alleviate mental or physical fatigue or stress. Two jobs involving most of the same duties do not require equal effort if one requires additional tasks that consume a significant amount of extra time or extra exertion.

Committee Comments

Effort means the physical or mental exertion required to perform a job. *See Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 719 (8th Cir. 2000). Two jobs involving most of the same duties do not require equal effort if one requires additional tasks that consume a significant amount of extra time or extra exertion. *See Peltier v. City of Fargo*, 533 F.2d374, 378-79 (8th Cir. 1976). "Extra" duties requiring only a minimal amount of time and which are necessary to the actual duties of the job will not justify a wage differential. *See id.* at 378-9.

5.35 EQUAL PAY ACT – DEFINITION: "RESPONSIBILITY"

"Responsibility" refers to the degree of accountability required to perform a job, with emphasis on the importance of the job duties, supervisory responsibilities, volume of work, and the degree of authority delegated to the employee.

Committee Comments

Responsibility refers to the degree of accountability required in performing a job. *See Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 719 (8th Cir. 2000). Actual job requirements and performance, as opposed to job classifications or titles, are to be considered. *See Hunt v. Nebraska Pub. Power Dist.*, 282 F.3d 1021, 1029 (8th Cir. 2002) (citing *Orahood v. Board of Trustees of the Univ. of Arkansas*, 645 F.2d 651, 654 (8th Cir. 1981)). An emphasis is placed on the importance of the job obligation. *See Usery v. Richman*, 558 F.2d 1318, 1321 (8th Cir. 1977). Two jobs likely are not substantially equal if one involves responsibility for more subordinate employees or a higher volume of work. *See Euerle-Wehle v. United Parcel Service*, 181 F.3d 898, 901 (8th Cir. 1999) (manager responsible for more subordinate employees); *Christopher v. Iowa*, 559 F.2d 1135, 1138-39 (8th Cir. 1977) (more volume of work involved in campus-wide delivery position compared to departmental delivery position). Employees with full-time supervisory duties justifiably can receive more compensation than employees with part-time supervisory duties. *See Krenik v. County of Le Sueur*, 47 F.3d 953, 961 (8th Cir. 1995). Two jobs requiring insubstantial or minor differences in supervisory responsibility may still be considered "substantially equal." *See Hunt*, 282 F.3d at 1030. "[W]hether a difference in supervisory responsibility is insubstantial and minor, or justifies a pay disparity, requires a factual inquiry into the circumstances of the particular case." *Id.* (citing *Buettner*, 216 F.3d at 719).

5.36 EQUAL PAY ACT – DEFINITION: "WORKING CONDITIONS"

The "working conditions" of a job include (1) the surroundings of the job, meaning the nature and character of the environment in which the work is performed and the elements to which an employee may be exposed, and (2) the hazards or physical dangers of the job, meaning the hazards or dangers regularly encountered, the frequency of those hazards or dangers, and the severity of any injury those hazards or dangers might cause. "Working conditions" do not have to be equal or identical to be similar.

Committee Comments

"Working conditions" is comprised of two subfactors: surroundings and hazards. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974). "Surroundings" takes into account the elements regularly encountered by the workers, such as toxic chemicals or fumes. *See id.* "Hazards" refers to the physical hazards regularly encountered by the workers, their frequency, and the severity of the potential injuries that could be caused. *See id.*

5.37 EQUAL PAY ACT – AFFIRMATIVE DEFENSES[1]

Even if you find all of the elements set forth in Instruction ___[2] have been proven by the [(greater weight) or (preponderance)][3] of the evidence, you must find in favor of defendant if you find by the [(greater weight) or (preponderance)][3] of the evidence the difference in pay was based on:

(1) a bona fide seniority system;

(2) a merit system;

(3) a system that measures earnings by quantity or quality of production; or

(4) [any factor other than sex].[4]

Notes on Use

1. This instruction should be used when the defendant is submitting an affirmative defense. It should be tailored to include only those affirmative defenses asserted.

2. Insert the number of the Instruction setting forth the essential elements for the plaintiff's claim.

3. Select the language that corresponds to the burden-of-proof instruction.

4. Insert language that describes the factor other than sex upon which the defendant relies (e.g., "job performance," "education," or "experience").

Committee Comments

The Equal Pay Act specifically provides that a defendant is not liable under the Act when a disparity in pay between males and females is based on (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex. *See* 29 U.S.C. § 206(d)(1).

Seniority system. "A bona fide seniority system is a valid defense to the application of different standards of compensation." *Wood v. Southwestern Bell*, 637 F.2d 1188, 1193 (8th Cir. 1981) (Title VII case). It is proper to give a jury instruction defining a valid seniority system as simply a "bona fide seniority system," as opposed to defining the specific seniority system involved. *See Bjerke v. Nash Finch Co.*, No. Civ. A3-98-134, 2000 WL 33146937, at *3 (D. N.D. Dec. 4, 2000).

Merit system. If a plaintiff's salary is marginally different from comparable employees and legitimate factors are used to base salary differentials after evaluations, there is no violation of the Equal Pay Act. *See Brousard-Norcross v. Augustana College Ass'n*, 935 F.2d 974, 979 (8th Cir. 1991).

System which measures earnings by quantity or quality of production. "There is no discrimination if two employees receive the same pay rate, but one receives more total compensation because he or she produces more." *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029 (6th Cir. 1983). Similarly, an employee who generates more profits for the employer can be paid more than an employee of the opposite sex. *See, e.g., Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 597 (3rd Cir. 1973) (employer demonstrated salespersons in men's clothing department generated more profits than those in women's clothing department).

Factor other than sex. The Equal Pay Act's broad exemption for employers who pay different wages to different sexes based upon any "factor other than sex" indicates that the Act is intended to address the same kind of "purposeful gender discrimination" prohibited by the Constitution. *See Varner v. Illinois State Univ.*, 226 F.3d 927, 934 (7th Cir. 2000). The broad exemption allows an employer to provide a neutral explanation for a disparity in pay. *See id.*

A difference in the job performance between a male and female employee in the same position can be a "factor other than sex" sufficient to justify a disparity in pay. *See EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 362 (8th Cir. 1994) ("[P]erforming 'similar' duties does not bring about an inference that all Buyers did 'identical' work or even that objectively measured, they performed the Buyer's role equally."). Education or experience may be factors sufficient to justify a disparity in pay. *See Hutchins v. Int'l Bhd. of Teamsters*, 177 F.3d 1076, 1081 (8th Cir. 1999); *Clymore v. Far-Mar-Co., Inc.*, 709 F.2d 499, 503 (8th Cir. 1983); *Strecker v. Grand Forks County Social Service Board*, 640 F.2d 96, 100 (8th Cir. 1980). An employer's salary retention policy, maintaining a skilled employee's salary upon temporary change of position, may be a factor "other than sex" that justifies a salary differential. *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003). Reliance on prior salary may be a factor "other than sex" under appropriate circumstances. *Id.*

Payment of different wages because an employee of one sex is more likely to enter into "management training programs," however, is not a valid justification, where such programs appear to be available to only one sex. *See Hodgson v. Security National Bank of Sioux City*, 460 F.2d 57, 61 (8th Cir. 1972). Unequal wages due to alleged employee "flexibility" necessitates an inquiry into the frequency and the manner in which the additional flexibility is actually utilized. *See Peltier v. City of Fargo*, 533 F.2d 374, 377 (8th Cir. 1976).

If an employer has a legitimate fiscal reason, such as letting an employee work overtime instead of calling in a new employee to complete the additional duties, a wage differential to compensate for the overtime worked is justifiable. *See Fyfe v. Fort Wayne*, 241 F.3d 597, 600-01 (7th Cir. 2001). Additionally, paying an employee more in order to avoid harming the public, such as paying an employee overtime for spraying a greenhouse with harmful pesticides after hours instead of during normal working hours, is allowable. *See id.*

5.38A EQUAL PAY ACT – ACTUAL DAMAGES

If you find the elements set forth in Instruction ___[1] have been proven by the [(greater weight) or (preponderance)][2] of the evidence, [and none of the affirmative defenses listed in Instruction ___[3] have been proven by the [(greater weight) or (preponderance)][2] of the evidence,][4] you must award plaintiff such sum as you find by the [(greater weight) or (preponderance)][2] of the evidence will compensate plaintiff for the difference between what plaintiff was paid and what [the][5] member[s][5] of the opposite sex [(was) (were)][5] paid for performing substantially equal work under similar working conditions.

[In determining the proper amount, you must first determine the proper time period for an award of damages.

If you find by the[(greater weight) or (preponderance)][2] of the evidence that the conduct of defendant was "willful," you should consider wages earned from [_____ to _____].[6] The conduct of defendant was "willful" if you find by the [(greater weight) or (preponderance)][2] of the evidence that, in paying plaintiff a lower wage than one or more members of the opposite sex for substantially equal work under similar working conditions, defendant either knew it was violating the Equal Pay Act or acted with reckless disregard of the Equal Pay Act.

If you do not find by the [(greater weight) or (preponderance)][2] of the evidence, that the conduct of defendant was "willful," you should consider wages earned from [_____ to _____].[7]]

[In determining the proper amount, you should consider only wages earned from [_____ to _____].[7,8]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture, and you must not award damages by way of punishment or through sympathy.][9]

Notes on Use

1. Insert the number of the Instruction setting forth the essential elements for the plaintiff's claim.

2. Select the language that corresponds to the burden-of-proof instruction.

3. Insert the number of the Instruction setting forth the affirmative defenses.

4. This language should be used when the defendant is submitting an affirmative defense.

5. Select the proper singular or plural form.

6. Insert the date on which the plaintiff's cause of action accrued, or the date three years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.

7. Insert the date on which the plaintiff's cause of action accrued, or the date two years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.

8. This language should be used when the wilfulness of defendant's conduct is not at issue or the damages period is two years or less.

9. This paragraph may be given at the trial court's discretion.

Committee Comments

Employees who bring a successful Equal Pay Act claim are entitled to compensatory damages, usually composed of back wages and liquidated damages. *See Broadus v. O.K. Indus.*, 226 F.3d 937, 943 (8th Cir. 2000). The term "liquidated damages" is "'something of a misnomer' because it is not a sum certain amount determined in advance, rather it is 'a means of compensating employees for losses they might suffer by reason of not receiving their lawful wage at the time it was due.'" *Id.* (quoting *Reich v. Southern New England Telecommunications*, 121 F.3d 58, 70 n.4 (2d Cir. 1997)). Liquidated damages are awarded in an amount equal to the amount of back wages, *see* 29 U.S.C. § 216(b), unless the court finds in its discretion that the employer acted "in good faith and had reasonable grounds for believing that his act or omission was in violation of the [FLSA]." 29 U.S.C. § 260. Where the court finds the employer acted in good faith, it may "award no liquidated damages or award any amount thereof not to exceed the amount specified in [29 U.S.C. § 216]." *Id.* There is no need to instruct the jury on the issue of liquidated damages, as the amount is simply double the amount awarded for unpaid wages. "The burden is on the employer to show that the violation was in good faith." *See Broadus*, 226 F.3d at 944.

Back wages are normally limited to two years but may be extended to three years for a willful violation. *See* 29 U.S.C. § 255(a); *see also Redman v. U.S. West Bus. Res., Inc.*, 153 F.3d 691, 695 (8th Cir. 1998) ("[A]ll claims for violations of the FLSA must be 'commenced within two years after the cause of action accrued,' unless the violation was 'willful.'") (quoting 29 U.S.C. § 255(a)); *Clark v. Eagle Food Ctrs., Inc.*, No. 95-3459, 105 F.3d 662, 1997 WL 6145, at *2 (8th Cir. Jan. 9, 1997) ("Equal Pay Act provides two-year limitations period from filing of complaint or three-year limitations period if willful violation proven."). The word "willful" generally refers to conduct that is not merely negligent. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Willfulness is

established if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute. *Id.* The question of willfulness is a question for the jury. *See Broadus*, 226 F.3d at 944. The jury's decision on "willfulness" is distinct from the district judge's decision to award liquidated damages. *See id.*

Title VII awards may subsume part or all of Equal Pay Act claims. *See EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 358 (8th Cir. 1994). "[A plaintiff] is entitled only to one compensatory damage award if liability is found on any or all of the theories involved." *Id. (quoting Greenwood Ranches, Inc. v. Skie Constr. Co.*, 629 F.2d 518, 521 (8th Cir. 1980)).

5.38B EQUAL PAY ACT – NOMINAL DAMAGES

If you find that all of the elements set forth in Instruction ___[1] have been proven by the [(greater weight) or (preponderance)][2] of the evidence, [and that none of the affirmative defenses listed in Instruction ___[3] have been proven by the [(greater weight) or (preponderance)][2] of the evidence,][4] but you do not find that plaintiff's damages have ~~no~~ monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar ($1.00).

Notes on Use

1. Insert the number of the Instruction setting forth the essential elements for the plaintiff's claim.

2. Select the language that corresponds to the burden-of-proof instruction.

3. Insert the number of the Instruction setting forth the affirmative defenses.

4. This language should be used when the defendant is submitting an affirmative defense.

Committee Comments

One Dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm the plaintiff suffered from the violation of his or her rights. *See, e.g., Dean v. Civiletti,* 670 F.2d 99, 101 (8th Cir. 1982).

5.39 EQUAL PAY ACT - VERDICT FORM;

VERDICT[1]

Note: Complete the following paragraph by writing in the name required by your verdict.

On the [Equal Pay Act][2] claim of plaintiff [_____][3] against defendant [_____],[4] we find in favor of:

_____

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

> **Note**: Answer the next question only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date the form because you have completed your deliberations on this claim.

We find that plaintiff should be awarded damages in the amount of $_____ .

_____
Foreperson

Dated: _____

Notes on Use

1. The court may in its discretion use either this Verdict form or the following Special Interrogatories to the Jury form.

2. This phrase should be used when the plaintiff submits multiple claims to the jury.

3. Insert the name of the plaintiff.

4. Insert the name of the defendant.

5.40 HARASSMENT CASES

~~SEXUAL HARASSMENT~~ UNDER TITLE VII, 1981, 1983, ADA AND ADEA

~~OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE CIVIL RIGHTS ACT OF 1991~~

Introductory Comment

The following instructions are designed for use in ~~sexual~~ harassment cases ~~under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991~~. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986), the United States Supreme Court held that sexual harassment is "a form of sex discrimination prohibited by Title VII." ~~More recently, the Supreme Court addressed the requirements of a sexual harassment claim, *see* *Harris v. Forklift Sys., Inc.*,~~ 510 U.S. 17 (1993). *See also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Tuggle v. Mangan*, 348 F.3d 714 (8th Cir. 2003); *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002). Same-sex sexual harassment is also actionable under Title VII. ~~; ruled that *See* *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), and clarified the standards governing an employer's liability in sexual harassment cases, *see*~~ Harassment on the basis of race, color, national origin, religion, age and disability is actionable if it involves a hostile working environment. Harassment on the basis of sex, race, color, national origin or religion is prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). *See, e.g., Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999) (Title VII). Harassment on the basis of age is prohibited by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 623(a)(1), 631(a). *See, e.g., Williams v. City of Kansas City, MO*, 223 F.3d 749 (8th Cir. 2000); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151 (8th Cir. 1999) (ADEA). Harassment cases can also be brought under 42 U.S.C. § 1981, *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041 (8th Cir. 2002) (race and 1981); and under 42 U.S.C. § 1983, *Moring v. Arkansas Dept. of Correction.*, 243 F.3d 452 (8th Cir. 2001 (sex and 1983). Harassment on the basis of disability under the Americans with Disabilities Act (ADA) is actionable. *Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003).

According to guidelines promulgated by the Equal Employment Opportunity Commission (EEOC), sexual harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a). Two theories of sexual harassment have been recognized by the courts--"quid pro quo" and "hostile work environment" harassment. Those cases in which the plaintiff claims that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands are generally referred to as "quid pro quo" cases, as distinguished from cases based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *See Burlington Indus.*, 524 U.S. at 751.

Employment Cases ~~-- Element and Damage Instructions~~

~~Although t~~ The Supreme Court has ~~recently~~ stated that the "quid pro quo" and "hostile work environment" labels are not ~~longer~~ controlling for purposes of establishing employer liability. However, the terms--to the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general--are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. *See Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2265; *accord Newton v. Cadwell Lab.*, 156 F.3d 880, 883 (8th Cir. 1998) (recognizing Supreme Court's statement that "quid pro quo" and "hostile work environment" labels are no longer controlling for purposes of establishing employer liability).

In *Faragher* and *Burlington Industries*, the Supreme Court held that employers are vicariously liable for the discriminatory actions of their supervisory personnel. *Faragher*, 524 U.S. at 777-78; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2261; *accord Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 762 (8th Cir. 1998) (citing *Faragher* and *Burlington Industries*). It is not necessary that those at the highest executive levels receive actual notice before an employer is liable for ~~sexual~~ harassment. To establish liability, however, the Supreme Court differentiated between cases in which an employee suffers an adverse "tangible employment action" as a result of the supervisor's ~~sexual~~ harassment and those cases in which an employee does not suffer a tangible employment action, but suffers the intangible harm flowing from the indignity and humiliation of sexual harassment. *See Newton*, 156 F.3d at 883 (recognizing distinction between cases in which ~~sexual~~ harassment results in a tangible employment action and cases in which no tangible employment action occurs).

When an employee suffers a tangible employment action resulting from a supervisor's ~~sexual~~ harassment the employer's liability is established by proof of ~~sexual~~ harassment and the resulting adverse tangible employment action taken by the supervisor. *See Faragher*, 524 U.S. at ___, 118 S. Ct. at 2292-93; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270. *See also Newton*, 156 F.3d at 883. No affirmative defense, as described below, is available to the employer in those cases. *See Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 n.6 (8th Cir. 1998) (citing *Faragher*, 524 U.S. ___, 118 S. Ct. at 2293; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270).

In cases where no tangible employment action has been taken by the supervisor, the defending employer may interpose an affirmative defense to defeat liability or damages. That affirmative defense "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any ~~sexually~~ illegal harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270. *See also Taco Bell*, 156 F.3d at 887-88 (quoting *Faragher* and *Burlington Industries*); *Rorie*, 151 F.3d at 762 (quoting same). This Title VII analysis has generally been applied in other areas. *See, e.g., Knutson v. Brownstein*, 87 F.E.P.C., 1771, 2001 WL 1661929 (S.D.N.Y. Dec. 27, 2001) (ADEA harassment - affirmative defense.)

Whether an individual is a "supervisor" for purposes of ~~analyzing~~ vicarious liability under *Faragher* and *Burlington Industries* may be a contested issue. *Compare Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796, 800 (8th Cir. 1998) (lead person was "demonstratively not a part of [defendant's] management") *with id.*, 156 F.3d at 801 (J. Gibson, J., dissenting) (lead person was defendant's "agent" for purposes of reporting complaints and deposition testimony showed that lead person had supervisory authority over plaintiff and alleged harasser).

In light of the new guidance from the Supreme Court, the Committee has drafted instructions for use in three types of cases: (1) those cases in which the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands (Model Instruction 5.41, *infra*); (2) those cases in which the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to ~~sexual~~ illegal harassment by a supervisor sufficiently severe or pervasive to create a hostile working environment (Model Instruction 5.42, *infra*); and (3) those cases in which the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to ~~sexual~~ illegal harassment by non-supervisors sufficiently severe or pervasive to create a hostile working environment (Model Instruction 5.43, *infra*).

5.41 ~~SEXUAL~~ HARASSMENT
(By Supervisor With Tangible Employment Action)
Essential Elements

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of sexual harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(sex) (gender)][5]; and

Fourth, defendant (specify action(s) taken with respect to plaintiff)[6]; and

Fifth, plaintiff's [(rejection of) (failure to submit to)][7] such conduct [was a motivating factor][8] [played a part][9] in the decision to (specify action(s) taken with respect to plaintiff).

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim.~~9~~[10] [You may find that plaintiff's [(rejection of) (failure to submit to)] such conduct [was a motivating factor] [played a part] in defendant's (decision)[11] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.][12]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's sexual harassment claim (e.g., requests for sexual relations by his or her supervisor) should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is

skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of plaintiff's or defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. If the court wants to define this term, the following should be considered: "Conduct is 'unwelcome' if the plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive." This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. Because quid pro quo harassment usually involves conduct that is clearly sexual in nature, this element ordinarily may be omitted from the instruction. If it is based on something else, this sentence must be modified.

6. Insert the appropriate language depending on the nature of the case (*e.g.*, "discharged," "failed to hire," "failed to promote," or "demoted"). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

7. This instruction is designed for use in sexual harassment cases where the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands. If the plaintiff submitted to the supervisor's sexual advances, and the court allows the plaintiff to pursue such a claim under this instruction rather than requiring plaintiff to submit such a claim under Model Instruction 5.42, *infra*, this instruction must be modified or, alternatively, the trial court may use special interrogatories to build a record on all of the potentially dispositive issues. *See, e.g.*, *Karibian v. Columbia University*, 14 F.3d 773, 778 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994).

8. Most, if not all of these cases will arise under Title VII. "Motivating factor" is the correct phrase to use in all Title VII harassment cases. *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S. Ct. 2148 (2003). The substantive law in other areas should be consulted concerning the proper term to be used in such cases. The Committee recommends that the definition of "motivating factor" set forth in Model Instruction 5.96, *infra*, be given.

9. *See* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

10. Because this instruction is designed for use in cases in which tangible employment action has been taken, plaintiff's claim may be analyzed under the "motivating factor/same decision" format used in other Title VII cases. *See infra* Model Instruction 5.01A. For damages instructions and a verdict form, Model Instructions 5.02 through 5.05, *infra*, may be used.

11. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

12. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.".

Committee Comments

This instruction is designed primarily for use in sexual harassment cases where the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms or conditions of employment that is actionable under Title VII. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, ___, 118 S. Ct. 2257, 2265 (1998). These cases (i.e., cases based on threats which are carried out) are "referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *Id.* at 2264.

The "Unwelcome" Requirement

In sexual harassment cases, the offending conduct must be "unwelcome." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986). In the Eighth Circuit, "conduct must be 'unwelcome' in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive." *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986); *see also Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559, 565 (8th Cir. 1992). In the typical quid pro quo case, where the plaintiff asserts a causal connection between a refusal to submit to sexual advances and a tangible employment action, the "unwelcome" requirement will be met if the jury finds that the plaintiff in fact refused to submit to a supervisor's sexual advances. However, if the court allows a plaintiff to pursue a quid pro quo claim despite his or her submission to the supervisor's sexual advances, the "unwelcome" element is likely to be disputed and must be included.

Conduct Based on Sex

In general, the plaintiff must establish that harassment was "based on sex" in order to prevail on a sexual harassment claim. *See, e.g., Burns v. McGregor Elec. Indus., Inc. [Burns II]*, 989 F.2d 959, 964 (8th Cir. 1993). Because quid pro quo harassment involves behavior that is sexual in nature, there typically will not be a dispute as to whether the objectionable behavior was based on sex. As the Eighth Circuit has stated, "sexual behavior directed at a woman raises the inference that the harassment is based on her sex." *Burns I*, 955 F.2d 559, 564 (8th Cir. 1992).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S.75 (1998); *accord Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996).

Employer Liability

As noted in the Introductory Comment, the Supreme Court has recently held that an employer is "vicariously liable" when its supervisor's discriminatory act results in a tangible employment action. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, ___, 118 S. Ct. 2257, 2269 (1998) ("A tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer."). No affirmative defense is available is such cases. *Id*. at 2270.

Tangible Employment Action

According to the Supreme Court, a "tangible employment action" for purposes of the vicarious liability issue means "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (citations omitted). In most cases, a tangible employment action "inflicts direct economic harm." *Id.* at 762.

5.42 ~~SEXUAL~~ HARASSMENT (By Supervisor With No Tangible Employment Action) Essential Elements

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of [sex~~ual~~/gender] [racial] [color] [national origin] [religious] [age] [disability] harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct or conditions giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(sex/gender) (race) (color) (national origin) (religion) (age) (disability) ~~(gender)~~][5]; and

Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be [(hostile) (abusive)][6]; and

Fifth, at the time such conduct occurred and as a result of such conduct, plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)].

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, [or if defendant is entitled to a verdict under Instruction ____,][7] your verdict must be for the defendant and you need not proceed further in considering this claim.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's ~~sexual~~ harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence.

Placing undue emphasis on a particular theory of plaintiff's or defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. The term "unwelcome" may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: "Conduct is 'unwelcome' if the plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive." This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. As noted in the Committee Comments, there are a number of subsidiary issues which can arise in connection with the requirement that actionable harassment must be "based on sex" or other prohibited category. If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, age or race, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a "raunchy workplace"--it may be necessary to modify this element to properly frame the issue.

6. Select the word which best describes plaintiff's theory. Both words may be appropriate. This element sets forth the "objective test" for a hostile work environment. As discussed in the Committee Comments, it is the Committee's position that the appropriate perspective is that of a "reasonable person." In addition, it may be appropriate to include the factors set forth in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and reiterated in *Faragher v. City of Boca Raton*, 524 U.S. 775, ___, 118 S. Ct. 2275, 2283 (1998), to aid in determining whether a plaintiff's work environment was hostile or abusive. For example:

> In determining whether a reasonable person in the plaintiff's circumstances would find the plaintiff's work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff's work performance; and the effect on plaintiff's psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

7. Because this instruction is designed for cases in which no tangible employment action is taken, the defendant may defend against liability or damages by proving an affirmative defense "of reasonable oversight and of the employee's unreasonable failure to take advantage of corrective opportunities." *Nichols v. American Nat'l Ins. Co.*, 154 F.3d 875, 887 (8th Cir. 1998) (citing *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270). The bracketed language should be used when the defendant is submitting the affirmative defense. *See infra* Model Instruction 5.42(A).

Committee Comments

This instruction is designed for use in ~~sexual~~ harassment cases where the plaintiff did not suffer any "tangible" employment action such as discharge or demotion, but rather suffered "intangible" harm flowing from a supervisor's ~~sexual~~ harassment that is "sufficiently severe or pervasive to create a hostile work environment." *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742,751 (1998).

It is impossible to compile an exhaustive list of the types of conduct that may give rise to a hostile environment ~~sexual~~ harassment claim under Title VII and other statutes. Some examples of this kind of conduct include: verbal abuse of a sexual, racial or religious nature; graphic verbal commentaries about an individual's body, sexual prowess, or sexual deficiencies; or age; sexually degrading or vulgar words to describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994); *Hukkanen v. International Union of Operating Eng'rs Local No. 101*, 3 F.3d 281 (8th Cir. 1993); *Burns v. McGregor Elec. Indus., Inc. [Burns II]*, 989 F.2d 959 (8th Cir. 1993); *Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559 (8th Cir. 1992); *Jones v. Wesco Invs., Inc.*, 846 F.2d 1154 (8th Cir. 1988); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988).

Conduct Based on Sex or Gender

In general, in a sex discrimination case, the plaintiff must establish that the alleged offensive conduct was "based on sex." *Burns II*, 989 F.2d at 964. Despite its apparent simplicity, this requirement raises a host of interesting issues. For example, in an historically male-dominated work environment, it may be commonplace to have sexually suggestive calendars on display and provocative banter among the male employees. While the continuation of this conduct may not be directed at a new female employee, it nevertheless may be actionable on the theory that sexual behavior at work raises an inference of discrimination against women. *See Burns I*, 955 F.2d at 564; *see also Stacks v. Southwestern Bell*, 27 F.3d 1316 (8th Cir. 1994) (sexual conduct directed by male employees toward women other than the plaintiff was considered part of a hostile work environment).

The Eighth Circuit also has indicated that conduct which is not sexual in nature but is directed at a woman because of her gender can form the basis of a hostile environment claim. *See, e.g., Gillming v. Simmons Indus.*, 91 F.3d 1168, 1171 (8th Cir. 1996) (jury instruction need not require a finding that acts were explicitly sexual in nature); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (calling a female employee "herpes" and urinating in her gas tank, although not conduct of an explicit sexual nature, was properly considered in determining if a hostile work environment existed); *see also Stacks*, 27 F.3d at 1326 (differential treatment based on gender in connection with disciplinary action supported a female employee's hostile work environment claim); *Shope v. Board of Sup'rs*, 14 F.3d 596 (table), 1993 WL 525598 (4th Cir. Dec. 20, 1993) (rude, disparaging, and "almost physically abusive" conduct based on gender supported a hostile environment claim).

The Eighth Circuit has not directly addressed the issue of whether vulgar or abusive conduct that is directed equally toward men and women can constitute a violation of Title VII. Because sexual harassment is a variety of sex discrimination, some courts have suggested that it is not a violation of Title VII if a manager is equally abusive to male and female employees. For example, in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), *abrogated on other grounds*, 510 U.S. 178 (1993), the court suggested that sexual harassment of all employees by a bisexual supervisor would not violate Title VII. In a similar vein, the district court in *Kopp v. Samaritan Health System, Inc.*, 13 F.3d 264 (8th Cir. 1993), granted the employer's motion for summary judgment on the theory that the offending supervisor was abusive toward all employees. Although the Eighth Circuit reversed because the plaintiff had offered evidence that the abuse directed toward female employees was more frequent and more severe than the abuse directed at male employees, *Kopp* suggests that the "equal opportunity harassment" defense can present a question of fact for the jury. *But see Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993) (holding that "equal opportunity harassment" of employees of both genders can violate Title VII).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *accord Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996).

Hostile or Abusive Environment

In order for hostile environment harassment to be actionable, it must be "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))); *accord Parton v. GTE North, Inc.*, 971 F.2d 150, 154 (8th Cir. 1992); *Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559, 564 (8th Cir. 1992); *Staton v. Maries County*, 868 F.2d 996, 998 (8th Cir. 1989); *Minteer v. Auger*, 844 F.2d 569 (8th Cir. 1988). In *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986), the court explained:

> The harassment must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Henson v. City of Dundee*, 682 F.2d at 904. The plaintiff must show a practice or pattern of harassment against her or him; a single incident or isolated incidents generally will not be sufficient. The plaintiff must generally show that the harassment is sustained and non trivial.

Id. at 749-50; *see Faragher*, 524 U.S. at 788 ("'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (citations omitted). *Compare Henthorn v. Capitol Communications, Inc.*, No. 03-1018 (8th Cir. Mar. 5, 2004) *and Duncan v. General Motors Co.*, 300 F.3d 928, 933

(8th Cir. 2002) *with Eich v. Board of Regents for Central Missouri State University*, 850 F.3d 752 (8th Cir. 2004).

"[I]n assessing the hostility of an environment, a court must look to the totality of the circumstances." *Stacks*, 27 F.3d at 1327 (citation omitted). In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993), the Court held that a hostile environment claim may be actionable without a showing that the plaintiff suffered psychological injury. In determining whether an environment is hostile or abusive, the relevant factors include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23. *See also Faragher*, 524 U.S. at ___, 118 S. Ct. at 2283 (reiterating relevant factors set forth in *Harris*); *accord Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 (8th Cir. 1998) (citing *Harris*).

These same factors have generally been required in all types of harassment/hostile environment cases. See the cases cited in Instruction 5.40, *infra*.

Objective and Subjective Requirement

In *Harris*, the Supreme Court explained that "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher*, 524 U.S. at 787 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) ("[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.")); *accord Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 761 (8th Cir. 1998).

Employer Liability

As noted in the Introductory Comment, the Supreme Court has recently held that an employer is "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Unlike those cases in which the plaintiff suffers a tangible employment action, however, in cases where no tangible employment action has been taken by the supervisor, the employer may raise an affirmative defense to liability or damages. *Id*. *See infra* Model Instruction 5.42(A) & Committee Comments.

5.42 A AFFIRMATIVE DEFENSE
(For Use in Supervisor Cases With No Tangible Employment Action)

Your verdict must be for defendant on plaintiff's claim of ~~sexual~~ harassment if it has been proved by the [greater weight) (preponderance)][1] of the evidence that (a) defendant exercised reasonable care to prevent and correct promptly any ~~sexually~~ harassing behavior; and (b) that plaintiff unreasonably failed to take advantage of (specify the preventive or corrective opportunities provided by defendant of which plaintiff allegedly failed to take advantage or how plaintiff allegedly failed to avoid harm otherwise).[2]

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given.

2. According to the Supreme Court, a defendant asserting this affirmative defense must prove not only that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, but also that "plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by defendant or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270. For purposes of instructing the jury, however, the Committee recommends that the specific preventive or corrective opportunities of which plaintiff allegedly failed to take advantage or the particular manner in which plaintiff allegedly failed to avoid harm be identified.

Committee Comments

~~Recently, t~~The United States Supreme Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by [the employee's] supervisor." *Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 762 (8th Cir. 1998) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 777 (1998)). When "no tangible employment action, such as discharge, demotion, or undesirable reassignment" is taken, however, an employer may defend against liability or damages "by proving an affirmative defense of reasonable oversight and of the employee's unreasonable failure to take advantage of corrective opportunities." *Nichols v. American Nat'l Ins. Co.*, 154 F.3d 875, 887 (8th Cir. 1998) (citing *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270)); *accord Phillips v. Taco Bell Corp.*, 156 F.3d 884, 888 (8th Cir. 1998) (citing same); *Newton v. Cadwell Laboratories*, 156 F.3d 880, 883 (8th Cir. 1998) (citing same). The language of the affirmative defense is taken verbatim from the Supreme Court's decisions in *Burlington Industries* and *Faragher*. Although no Eighth Circuit cases so hold, this affirmative defense has been held applicable to harassment claims made under ADEA, *Lacher v. West*, 147 F. Supp. 2d 538 (N.D. Tex.

2001); claims under the ADA, *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999) (assumes harassment actionable under the ADA); under 42 U.S.C. § 1983; *Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000); and under 42 U.S.C. § 1981, *Jackson v. Quanex Corp.*, 191 F.3d 647 (6th Cir. 1999).

5.43 ~~SEXUAL~~ HARASSMENT (By Nonsupervisor) ~~With No Tangible Employment Action)~~

Essential Elements

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of [sexual/gender] [racial] [color] [national origin] [religious] [age] [disability] harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct or conditions giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(sex~~)~~ ~~(~~/gender) (race) (color) (national origin) (religion) (age) (disability)][5]; and

Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be [(hostile) (abusive)][6]; and

Fifth, at the time such conduct occurred and as a result of such conduct, plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)]; and

Sixth, defendant knew or should have known of the (describe alleged conduct or conditions giving rise to plaintiff's claim)[7]; and

Seventh, defendant failed to take prompt and appropriate corrective action to end the harassment.[8]

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim.[9]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's ~~sexual~~ harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the

appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of plaintiff's or defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. The term "unwelcome" may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: "[Conduct is 'unwelcome'] if the employee did not solicit or invite it and the employee regarded the conduct as undesirable or offensive." This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. As noted in the Committee Comments, there are a number of subsidiary issues which can arise in connection with the requirement that actionable harassment must be "based on sex" or other prohibited category. If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, age or race, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a "raunchy workplace"--it may be necessary to modify this element to properly frame the issue.

6. Select the word which best describes plaintiff's theory. Both words may be appropriate. This element sets forth the "objective test" for a hostile work environment. As discussed in the Committee Comments, it is the Committee's position that the appropriate perspective is that of a "reasonable person." In addition, it may be appropriate to include the factors set forth in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and reiterated in *Faragher v. City of Boca Raton*, 524 U.S. 775, ___, 118 S. Ct. 2275, 2283 (1998), to aid in determining whether a plaintiff's work environment was hostile or abusive. For example:

> In determining whether a reasonable person in the plaintiff's circumstances would find the plaintiff's work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff's work performance; and the effect on plaintiff's psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

7. As noted in the Committee Comments, there are generally two requirements for establishing employer liability in sexual harassment cases where the plaintiff claims harassment by his or her coworkers rather than by supervisory personnel: (1) the plaintiff must show that the employer knew or

should have known of the harassment; and (2) the plaintiff must show that the employer failed to take appropriate action to end the harassment. This element sets forth the first half of the test. As a practical matter, it is unlikely that the defendant will seriously contest both issues: if the employer claims it never knew of the harassment, the question of whether its response was appropriate would be moot; conversely, if the employer's primary defense is that it took appropriate remedial action, the "knew or should have known" element may be moot.

8. As discussed in the Introductory Comment, the Supreme Court's recent opinions with respect to employer liability in sexual harassment cases address only those situations in which a supervisor (as opposed to a non-supervisor) sexually harasses a subordinate. In cases in which the plaintiff alleges sexual harassment by a non-supervisor, the issue of whether courts will leave the burden on plaintiff to prove that the defendant failed to take prompt and appropriate corrective action or whether courts will place the burden on the defendant to prove an affirmative defense that it took prompt and appropriate corrective action as in *Faragher* and *Burlington Industries* is an open question. *See, e.g., Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999) (Barkett, concurring).

9. Because this instruction is designed for use in cases in which no tangible employment action has been taken, plaintiff's claim should not be analyzed under the "motivating factor/same decision" format used in other Title VII cases. *See Stacks v. Southwestern Bell*, 27 F.3d 1316 (8th Cir. 1994). For damages instructions and a verdict form, Model Instructions 5.02 through 5.05, *infra*, should be used in a modified format. For a sample constructive discharge instruction, *see infra* Model Instruction 5.93.

Committee Comments

This instruction is designed for use in cases where the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to sexual or other harassment by non-supervisors (as opposed to supervisory personnel) sufficiently severe or pervasive to create a hostile working environment. In such cases (*i.e.*, cases not involving vicarious liability), "[e]mployees have some obligation to inform their employers, either directly or otherwise, of behavior that they find objectionable before employer can be held responsible for failing to correct that behavior, at least ordinarily." *Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796, 800 (8th Cir. 1998) (decided after the Supreme Court's opinions in *Burlington Industries* and *Faragher*). Although no Eighth Circuit cases clearly decide this issue, the Committee believes it is likely the court will follow this approach in all harassment claims, not just in Title VII cases.

5.44A HARASSMENT - Actual Damages

Commentary

Actual damages for harassment are generally governed by the same statute which prohibits the discrimination itself. Thus,

5.02A should be reviewed for drafting an instruction dealing with actual damages in sexual harassment or other harassment cases under Title VII;

5.12A should be reviewed for drafting an instruction dealing with actual damages in age harassment cases under the ADEA;

5.22A should be reviewed for drafting an instruction dealing with actual damages in harassment cases under 42 U.S.C. § 1981;

5.27A should be reviewed for drafting an instruction dealing with actual damages in harassment cases under 42 U.S.C. § 1983;

5.54A should be reviewed for drafting an instruction dealing with actual damages in harassment cases under the ADA.

5.44B HARASSMENT - Nominal Damages

Commentary

Nominal damages for harassment are generally governed by the same statute which prohibits the discrimination itself. Thus,

5.02B should be reviewed for drafting an instruction dealing with nominal damages in sexual harassment or other harassment cases under Title VII;

5.12B should be reviewed for drafting an instruction dealing with nominal damages in age harassment cases under the ADEA;

5.22B should be reviewed for drafting an instruction dealing with nominal damages in harassment cases under 42 U.S.C. § 1981;

5.27B should be reviewed for drafting an instruction dealing with nominal damages in harassment cases under 42 U.S.C. § 1983;

5.54B should be reviewed for drafting an instruction dealing with nominal damages in harassment cases under the ADA.

5.44C HARASSMENT - Punitive Damages

Commentary

Punitive damages for harassment are generally governed by the same statute which prohibits the discrimination itself. Thus,

5.02C should be reviewed for drafting an instruction dealing with punitive damages in sexual harassment or other harassment cases under Title VII;

5.12C should be reviewed for drafting an instruction dealing with liquidated damages in age harassment cases under the ADEA;

5.22C should be reviewed for drafting an instruction dealing with punitive damages in harassment cases under 42 U.S.C. § 1981;

5.27C should be reviewed for drafting an instruction dealing with punitive damages in harassment cases under 42 U.S.C. § 1983;

5.54C should be reviewed for drafting an instruction dealing with punitive damages in harassment cases under the ADA.

5.50 DISPARATE TREATMENT AND REASONABLE ACCOMMODATION CASES UNDER THE AMERICANS WITH DISABILITIES ACT ("ADA") (Employment Cases Only)

Introduction

The following instructions are designed for use in disability cases under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. ~~{ The ADA was enacted July 26, 1990, and became effective July 26, 1992. The purposes of the ADA are to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. See 42 U.S.C. § 12101(b).~~

~~Some of the key issues in those cases include whether an individual has a "disability" as defined in the ADA; whether the individual is "otherwise qualified" for the position; whether the individual can perform the "essential functions" of the job with or without "reasonable accommodations"; and whether the employer has provided "reasonable accommodations." The instructions focus on many of these issues.}~~

These instructions are not intended to cover cases with respect to public accommodations or public services under the ADA. Rather, these instructions are intended to cover only those cases arising under the employment provisions of the ADA.

To establish a prima facie case under the ADA, an aggrieved employee must establish that he or she has a disability as defined in 42 U.S.C. § 12102(2); that he or she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and that he or she has suffered adverse employment action because of his or her disability. *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000); *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 574 (8th Cir. 2000); *Snow v. Ridgeway Med. Ctr.*, 128 F.3d 1201, 1206 (8th Cir. 1997); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996); *Price v. S-B Power Tool*, 75 F.3d 362, 365 (8th Cir. 1996).

A "Disability" Under the ADA

Under the ADA, a "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2); *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 948 (8th Cir. 1999); *Snow*, 128 F.3d at 1206; *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997); *Smith v. City of Des Moines*, 99 F.3d 1466, 1474 (8th Cir. 1996).

Although the ADA does not define the key phrases found in subsection (A) of 42 U.S.C. § 12102(2) (*i.e.*, "physical or mental impairment," "major life activity," and "substantially limits"), the regulations implementing the ADA provide guidance on these issues.

"Physical or Mental Impairment"

According to the regulations, a "physical impairment" is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine. 29 C.F.R. § 1630.2(h); *Otting v. J.C. Penney Co.*, 223 F.3d 704, ~~{____}~~708-09 (8th Cir. 2000). A "mental impairment" is any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h).

"Being Regarded as Having Such an Impairment"

To prevail on a claim that the defendant regarded the plaintiff as disabled, the plaintiff must show that the defendant either believed the plaintiff had a substantially limiting impairment that the plaintiff did not have or believed the plaintiff had a substantially limiting impairment when in fact the impairment was not so limiting. *Conant v. Hibbing*, 271 F.3d 782, 784 (8th Cir. 2001) (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)). It is not enough for plaintiff to be regarded as "having a limiting but not disabling restriction." *Id*. at 785. Compare *Brown v. Lester E. Cox Medical Centers*, 286 F.3d 1040, 1045 (8th Cir. 2002) (plaintiff adduced sufficient evidence that employer thought her multiple sclerosis made her unfit for any further employment at hospital) with *Conant*, 271 F.3d at 785 (no evidence that employer perceived applicant as "anything more than unable to perform this particular job").

"Major Life Activity"

The regulations define the term "major life activity" as activities that an average person can perform with little or no difficulty, such as walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself, and working. 29 C.F.R. § 1630.2(i); *Otting*, 223 F.3d at 710; *Fjellestad*, 188 F.3d at 948; *Snow*, 128 F.3d at 1207 n.3; *Doane*, 115 F.3d at 627; *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996); *accord Shipley v. City of University City*, 195 F.3d 1020, 1022 (8th Cir. 1999) (citing *Bragdon v. Abbott*, 524 U.S. 624, 638-39 (1998)). Sitting, standing and reaching are also considered major life activities. *Fjellestad*, 188 F.3d at 948 (citing *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997)). The Supreme Court has held that reproduction is a major life activity for purposes of the ADA. *Bragdon v. Abbott*, 524 U.S. 635, 638-39, 118 S. Ct. 2196, 2205 (1998). *See also Land v. Baptist Med. Ctr.*, 164 F.3d 423, 424 (8th Cir. 1999) (eating is a major life activity); *Weber v. Strippit, Inc.*, 186 F.3d 907, 913-14 (8th Cir. 1999) (shoveling snow, gardening, mowing the lawn, playing tennis, walking up stairs, fishing and hiking do not qualify as major life activities).

~~{Although lifting is also considered a major life activity, a general lifting restriction, without more, is generally insufficient to constitute a significant limitation on any}~~ The Supreme Court, in *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, ___, 122 S. Ct. 681, 691 (2002), held that major life

activities {. See, e.g., Snow, 128 F.3d at 1207 ("While lifting is noted under the regulations as a major life activity, a general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA."); Helfter, 115 F.3d at 617 (evidence that impairment limits work-related activities such as lifting does not demonstrate triable dispute regarding substantial limitation on major life activity); Aucutt, 85 F.3d at 1319 (twenty-five pound lifting restriction, without more, does not constitute a significant restriction on ability to perform major life activities).

The Eighth Circuit has held that reproduction and caring for others are not major life activities under the ADA. See Krauel v. Iowa Methodist Center, 95 F.3d 674, 677 (8th Cir. 1996). But see Bragdon v. Abbott, 524 U.S. 639, ___, 118 S. Ct. 2196, 2205 (1998) (reproduction is a major life activity for purposes of the ADA)} are those that are "central to daily life." The court noted that "the manual tasks unique to any particular job are not necessarily important parts of most people's lives," whereas inability to perform household chores and personal hygiene "are among the types of manual tasks of central importance to people's daily lives." *Id.* at 693.

"Substantially Limiting"

In order for an impairment to be considered "substantially limiting," the individual must be (i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a major life activity. 29 C.F.R. § 1630.2(j)(1); *Fjellestad*, 188 F.3d at 948-49; *Snow*, 128 F.3d at 1206 (8th Cir. 1997); *Helfter*, 115 F.3d at 616. The United States Supreme Court has held that a physical or mental impairment that is corrected by medication, the body's own systems, or other measures does not "substantially limit" a major life activity. *See Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *accord Spades v. City of Walnut Ridge*, 186 F.3d 897, 899-900 (8th Cir. 1999) (alleged disability of depression did not substantially limit any of plaintiff's major life activities where plaintiff conceded that resort to medicines and counseling allowed him to function without limitation); *Cooper v. Olin Corp.*, 246 F.3d 1083, 1088-89 (8th Cir. 2001) (depression did not substantially limit plaintiff's major life activities where she lived alone, handled her own finances, operated heavy equipment and cared for animals, home and farmland); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8th Cir. 2002) (pharmacist, whose diabetes was treated with insulin and diet, failed to demonstrate that his condition substantially limited his major life activities; court could not consider what could or would occur if plaintiff stopped treating his diabetes or how it might develop in the future). *Cf. Otting v. J.C. Penney Co.*, 223 F.3d 704, {___}710-11 (8th Cir. 2000) (plaintiff's epilepsy substantially limited one or more major life activities where, despite surgery and medication, seizures were not under control at time of discharge).

The following factors are relevant in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long-term impact, or the expected permanent or long-term

impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2); *Otting*, 223 F.3d at ~~{____}~~711; *Fjellestad*, 188 F.3d at 949; *Snow*, 128 F.3d at 1207; *Helfter*, 115 F.3d at 616; *Aucutt*, 85 F.3d at 1319.

Thus, temporary, non-chronic impairments of short duration with little or no long-term or permanent impact are usually not disabilities. *See Gutridge v. Clure*, 153 F.3d 898, 901-02 (8th Cir. 1998) (citing 29 C.F.R. § 1630 App., § 1630.2(j); *Heintzelman v. Runyon*, 120 F.3d 143, 145 (8th Cir. 1997)).

The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. *Snow*, 128 F.3d at 1206 (citing 29 C.F.R. § 1630.2(j)(3)(i)); *Aucutt*, 85 F.3d at 1319 (same); *accord Fjellestad*, 188 F.3d at 949 ("Finding that an individual is substantially limited in his or her ability to work requires a showing that his or her overall employment opportunities are limited."). Rather, a person must show the impairment significantly restricts his or her ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *Snow*, 128 F.3d at 1206-07 (citing 29 C.F.R. § 1630.2(j)(3)(i)); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996) (same); *accord Shipley*, 195 F.3d at 1022-23 (citing *Sutton*, 119 S. Ct. at 2150-52); *Fjellestad*, 188 F.3d at 949.

Knowledge of the Disability

Unlike other discrimination cases, the protected characteristic of the employee in a disability discrimination case may not always be immediately obvious to the employer. As the Seventh Circuit has stated, "It is true that an employer will automatically know of many disabilities. For example, an employer would know that a person in a wheelchair, or with some other obvious physical limitation, had a disability." *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 932 (7th Cir. 1995). Furthermore, it may be that some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability (*e.g.*, an employee who suffers frequent seizures at work likely has some disability). *Id.* at 934. Finally, an employer may actually know of disabilities that are not immediately obvious, such as when an employee asks for an accommodation under the ADA and submits supporting medical documentation. *See id.* at 932.

An employer's mere knowledge of the disability's effects, far removed from the disability itself and with no obvious link to the disability, is generally insufficient to create liability. As one court has aptly stated, "[t]he ADA does not require clairvoyance." *See id.* at 934.

A number of ~~{recent}~~ Eighth Circuit decisions suggest that an employer must have actual knowledge of an employee's disability before the employer may be exposed to liability. *See, e.g., Miller v. National Casualty Co.*, 61 F.3d 627, 629-30 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously

manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg*, 47 F.3d at 934)); *Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that the employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of his disabling condition even though the employer had some awareness of the plaintiff's health problems).

A "Qualified" Individual with a Disability

In order to be protected by the ADA, an individual must be a "qualified individual with a disability." To be a qualified individual, one must be able to perform the essential functions of the job with or without reasonable accommodations. 42 U.S.C § 12111(8); *see also Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000) (determination of qualification involves two-fold inquiry--whether the person meets the necessary prerequisites for the job, such as education, experience and training, and whether the individual can perform the essential job functions with or without reasonable accommodation); *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 574-76 (8th Cir. 2000) (in order for court to assess whether plaintiff is "qualified" within the meaning of the ADA, plaintiff must identify particular job sought or desired).

Essential Functions of the Job

The phrase "essential functions" means the fundamental job duties of the employment position the plaintiff holds or for which the plaintiff has applied. *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 787 (8th Cir. 1998). "Essential functions" does not include the marginal functions of the position. *Id.* (citing 29 C.F.R. § 1630.2(n)(1)). The EEOC regulations suggest the following may be considered in determining the essential functions of an employment position: (1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions prepared for advertising or used when interviewing applicants for the job; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement if one exists; (6) the work experience of persons who have held the job; and/or (7) the current work experience of persons in similar jobs. 29 C.F.R. § 1630.2(n)(3); *Moritz*, 147 F.3d at 787. *See also Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445-46 (8th Cir. 1998) ("An employer's identification of a position's "essential functions" is given some deference under the ADA."); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1113-14 (8th Cir. 1995) (discussing "essential functions" and relevant EEOC regulations); *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847, 850 (8th Cir. 2002) (employee's absenteeism prevented her from performing essential functions of job); *Dropinski v. Douglas County*, 298 F.3d 704, 708-09 (8th Cir. 2002) (employee who could not perform several of the functions of the written job description for an automatic equipment operator, including tasks entailing bending, twisting, squatting and lifting over fifty pounds, could not perform essential functions of the job); *Alexander v. The Northland Inn*, 321 F.3d

723, 727 (8th Cir. 2003) (vacuuming was an essential function of housekeeping supervisor position; plaintiff, whose physician said she could do no vacuuming, was not a qualified individual).

Resolving a conflict among the courts of appeals, the United States Supreme Court held that an ADA plaintiff's application for or receipt of benefits under the Social Security Disability Insurance program neither automatically estops the plaintiff from pursuing his or her ADA claim nor erects a strong presumption against the plaintiff's success under the ADA. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, ~~{___}~~797, 119 S. Ct. 1597, 1600 (1999). Nonetheless, to survive a motion for summary judgment, the plaintiff must explain why his or her claim for disability benefits is consistent with the claim that he or she could perform the essential functions of his or her previous job with or without reasonable accommodation. *Id.*; *accord Hill v. Kansas City Area Transportation Authority*, 181 F.3d 891, 893 (8th Cir. 1999). *See also Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084-85 (8th Cir. 2000) (affirming grant of summary judgment to employer in part because plaintiff failed to overcome presumption, created by prior allegation of total disability, that he is not a qualified individual within the meaning of the ADA); *Gilmore v. AT&T*, 319 F.3d 1042 (8th Cir. 2003) (affirming summary judgment for employer where plaintiff failed to provide any evidence to reconcile her ADA claim with her assertion, in application for Social Security Disability, that she was unable to perform essential functions of her job).

"Reasonable Accommodation"

The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). A refusal to provide a reasonable accommodation can amount to a constructive demotion. *See Fenney v. Dakota, Minnesota & Eastern Railroad Co.*, 327 F.3d 707, 717-18 (8th Cir. 2003).

Although there is no precise test for determining what constitutes a reasonable accommodation, an accommodation is unreasonable if it imposes undue financial or administrative burdens or if it otherwise imposes an undue hardship on the operation of the employer's business. 42 U.S.C. § 12112(b)(5)(A); *Buckles v. First Data Resources, Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999). The "undue hardship" defense is discussed below.

The ADA provides that the concept of "reasonable accommodation" may include: "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications or examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9). *See also Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-24 (8th Cir. 1995) (discussing "reasonable accommodations" and relevant EEOC regulations).

Although part-time work and job restructuring may be considered reasonable accommodations, "[t]his does not mean an employer is required to offer those accommodations in every case." *Treanor*, 200 F.3d at 575. Moreover, although job restructuring is a possible accommodation under the ADA, an employer need not reallocate the essential functions of a job. *Id.*; *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999); *Lloyd*, 207 F.3d at 1084; *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Benson*, 62 F.3d at 1112-13 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)). In addition, an employer is not obligated to hire additional employees or reassign existing workers to assist an employee. *Fjellestad*, 188 F.3d at 950 (citing *Moritz*, 124 F.3d at 788).

Reassignment to a vacant position is another possible accommodation under the ADA. *Benson*, 62 F.3d at 1114 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)); *see also Fjellestad*, 188 F.3d at 950-51 (plaintiff created genuine issue of material fact as to whether employer could have reassigned her to a specific, vacant position). In fact, the Eighth Circuit has recognized that, in certain circumstances, reassignment to a vacant position may be "necessary" as a reasonable accommodation. *See Cravens*, 214 F.3d at 1018. The scope of the reassignment duty is limited, however. *Id.* at 1019. For example, reassignment is an accommodation of "last resort"; that is, the "very prospect of reassignment does not even arise unless accommodation within the individual's current position would pose an undue hardship." *Id.* Moreover, the ADA does not require an employer to create a new position as an accommodation. *Id.*; *see also Treanor*, 200 F.3d at 575 ("[T]he ADA does not require an employer to create a new part-time position where none previously existed."); *Fjellestad*, 188 F.3d at 950 (employer not required to create new position or to create permanent position out of a temporary one). In addition, an employer is not required to "bump" another employee in order to reassign a disabled employee to that position. *Cravens*, 214 F.3d at 1019. Promotion is not required. *Id.* Finally, the employee must be "otherwise qualified" for the reassignment position. *Id.*

An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.'").

An employer's showing that the requested accommodation would violate the rules of an existing seniority system is ordinarily enough to show that the accommodation is not "reasonable" and to entitle the employer to summary judgment. *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1519, 1524 (2002). The employee may defeat summary judgment by presenting evidence of special circumstances that make an exception to a seniority rule "reasonable" in the particular case. *Id.* at 1519, 1525.

Examples of special circumstances are the employer's fairly frequent exercise of a right to change the seniority system unilaterally and a seniority system containing exceptions such that one further exception is unlikely to matter. *Id*. at 1525.

The ADA does not require the preferential treatment of individuals with disabilities in terms of job qualifications as a reasonable accommodation. *See Harris v. Polk County*, 103 ~~(F.2d)~~ F.3d 696, 697 (8th Cir. 1996) (employer lawfully denied job to disabled applicant on basis of criminal record which allegedly had resulted from prior psychological problems because "an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees").

For more discussion of "reasonable accommodations" under the ADA, *see infra* Model Instruction 5.51(C) and Committee Comments.

The Interactive Process

Before an employer must make an accommodation for the physical or mental limitation of an employee, the employer must have knowledge that such a limitation exists. *Miller v. National Casualty Co.*, 61 F.3d 627, 629 (8th Cir. 1995); *accord Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723, 726 (8th Cir. 1999). Thus, it is generally the responsibility of the plaintiff to request the provision of a reasonable accommodation. *Miller*, 61 F.3d at 630 (citing 29 C.F.R. § 1630 App., § 1630.9); *Cannice*, 189 F.3d at 727; *accord Buckles v. First Data Resources, Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999) (The burden remains with the plaintiff "to show that a reasonable accommodation, allowing him to perform the essential functions of his job, is possible."); *Mole v. Buckhorn Rubber Prods., Inc.*, 165 F. 3d 1212, 1218 (8th Cir. 1999) (affirming grant of summary judgment for defendant where "only [plaintiff] could accurately identify the need for accommodations specific to her job and workplace" and she failed to do so); *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 689 (8th Cir. 1998) ("Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations." (citation omitted)).

Once the plaintiff has made such a request, the ADA and its implementing regulations require that the parties engage in an "interactive process" to determine what precise accommodations are necessary. *See* 29 C.F.R. § 1630.2(o)(3) & § 1630 App., § 1630.9; *accord Fjellestad*, 188 F.3d at 951. This means that the employer "should first analyze the relevant job and the specific limitations imposed by the disability and then, in consultation with the individual, identify potential effective accommodations." *See Cannice*, 189 F.3d at 727. In essence, the employer and the employee must work together in good faith to help each other determine what accommodation is necessary. *Id.*

Several courts, however, have held that an employer's failure to engage in an interactive process, standing alone, is insufficient to expose the employer to liability under the ADA. *See, e.g.*,

Barnett v. U.S. Air, Inc., 157 F.3d 744, 752 (9th Cir. 1998) (and cases cited therein); *accord Cravens*, 214 F.3d at 1021; *Fjellestad*, 188 F.3d at 952 ("We tend to agree with those courts that hold that there is no per se liability under the ADA if an employer fails to engage in an interactive process."); *Cannice*, 189 F.3d at 727.

The Eighth Circuit has recognized that although an employer will not be held liable under the ADA for failing to engage in an interactive process if no reasonable accommodation was possible, the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith. *See Fjellestad*, 188 F.3d at 952; *Cravens*, 214 F.3d at 1021 (To establish that an employer failed to participate in an interactive process, a disabled employee must show the employer knew about the disability; the employee requested accommodation or assistance; the employer did not make a good faith effort to assist the employee; and the employee could have been reasonably accommodated but for the employer's lack of good faith.). Accordingly, the Circuit held that summary judgment is typically precluded when there is a genuine dispute as to whether the employer acted in good faith and engaged in the interactive process of seeking reasonable accommodations. *See Cravens*, 214 F.3d at 1022; *Fjellestad*, 188 F.3d at 953; *accord Deane v. Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1998) (single telephone conversation between plaintiff and employer "hardly satisfies our standard that the employer make reasonable efforts to assist the employee [and] to communicate with him in good faith").

On the other hand, summary judgment may be appropriate where the employee fails to engage in the interactive process. *See, e.g., Treanor*, 200 F.3d at 575 (plaintiff failed to create a genuine question of fact in dispute on issue of interactive process where plaintiff requested part-time work, defendant indicated that no such position existed, plaintiff failed to identify any particular "suitable" position and there was no evidence that defendant acted in bad faith by failing to investigate further the existence of a reasonable accommodation); *Webster v. Methodist Occupational Health Centers, Inc.*, 141 F.3d 1236 (7th Cir. 1998) (no liability where employee failed to participate in the interactive process required under the ADA); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997) (no liability where plaintiff failed to engage in interactive process after employer offered accommodations in that she did not provide employer with any substantive reasons as to why all five of the proffered accommodations were unreasonable); *Gerdes v. Swift-Eckrich, Inc.*, 949 F. Supp. 1386 (N.D. Iowa 1996) (summary judgment for employer appropriate where responsibility for causing the breakdown of the interactive process rested plainly on plaintiff), *aff'd*, 125 F.3d 634 (8th Cir. 1997).

Similarly, summary judgment may be appropriate in the absence of evidence that the employer failed to make a good faith effort to arrive at a reasonable accommodation for the plaintiff. *See, e.g., Mole*, 165 F.3d at 1218 (affirming grant of summary judgment for employer where "there is no evidence [the employer] failed to make a good faith reasonable effort to help [plaintiff] determine if other accommodations might be needed."); *Beck v. University of Wisconsin Board of Regents*, 75

F.3d 1130, 1137 (7th Cir. 1996) ("[W]here, as here, the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and provide accommodation based on the information it possessed, ADA liability simply does not follow.").

Statutory Defenses

The ADA specifically provides for the following defenses: (1) undue hardship (42 U.S.C. § 12112(b)(5)(A)); (2) direct threat to the health or safety of others in the workplace (42 U.S.C. § 12113(b)); (3) employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)); (4) religious entity (42 U.S.C. § 12113(c)(1)); (5) infectious or communicable disease (42 U.S.C. § 12113(d)(2)); and (6) illegal use of drugs (42 U.S.C. § 12114(a)). The statutory defenses most likely to lead to instruction issues are undue hardship and direct threat. *See infra* Model Instructions 5.53(A) and 5.53(B). The Committee assumes that the burden of proving and pleading these defenses is on the defendant.

Undue Hardship

As set forth above, the ADA provides that an employer need not provide a reasonable accommodation if it can prove that the accommodation would impose an undue hardship on the operation of its business. The term "undue hardship" is defined as "an action requiring significant difficulty or expense," which is to be considered in light of the following factors: (i) the nature and cost of the accommodation; (ii) the employer's financial resources at the facility in question; (iii) the employer's overall financial resources; and (iv) the fiscal relationship of the facility in question with the employer's overall business. 42 U.S.C. § 12111(10).

Direct Threat

The ADA specifically permits employers to reject applicants and terminate employees who pose a "direct threat" to the health or safety of others in the workplace if such direct threat cannot be eliminated by reasonable accommodation. 42 U.S.C. § 12113(b); *see Wood v. Omaha Sch. Dist.*, 25 F.3d 667 (8th Cir. 1994) (insulin-dependent individuals with poorly controlled diabetes were not qualified to serve as school bus drivers).

The courts also have used the "direct threat" doctrine to support the terminations of individuals who assault or threaten co-workers. For example, in *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996), the court upheld the termination of an alcoholic employee who threatened his supervisor. *See also Crawford v. Runyon*, 79 F.3d 743 (8th Cir. 1996) (upholding district court's finding of no pretext in termination of postal worker who threatened to kill his supervisor); *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437 (D. Kan. 1996) (upholding termination of disgruntled employee who threatened to "go postal").

The Supreme Court, in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 78, 122 S. Ct. 2045, 2049 (2002), held that the statutory reference to threats to "other individuals in the workplace"

did not preclude the EEOC from adopting a regulation that, in the Court's words, "carries the defense one step further," by allowing an employer to adopt a qualification standard requiring that an individual not pose a direct threat to the individual's own health or safety, as well as the health or safety of others. 29 C.F.R. § 1630.15(b)(2). *See also* 29 C.F.R. § 1630.2(r).

Procedures and Remedies

Pursuant to 42 U.S.C. § 12117, ADA cases generally adopt the procedures and remedy schemes from Title VII cases. *Doane v. City of Omaha*, 115 F.3d 624, 629 (8th Cir. 1997). Accordingly, an EEOC charge and right-to-sue notice typically will be necessary preconditions to an ADA claim. *See* 42 U.S.C. § 2000e-5. By virtue of the Civil Rights Act of 1991, damages under the ADA generally are the same as those available under Title VII. Thus, potential remedies in ADA cases include backpay, compensatory damages, punitive damages, and attorneys' fees. *See* 42 U.S.C. § 1981a.

In ADA cases, a plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor" in the adverse employment decision. *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995). *See also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 97-102, 123 S. Ct. 2148, 2152-53 (2003) (holding that "motivating factor" is the standard for liability in a Title VII discrimination case). The employer may nevertheless avoid an award of damages or reinstatement by showing that it would have taken the same action in the absence of the impermissible motivating factor. *Pedigo*, 60 F.3d at 1301; *Doane*, 115 F.3d at 629. In such cases, "remedies available are limited to a declaratory judgment, an injunction that does not include an order for reinstatement or for back pay, and some attorney's fees and costs." *Doane*, 115 F.3d at 629 (quoting *Pedigo*, 60 F.3d at 1301) (citing 42 U.S.C. § 2000e-5(g)(2)(B)(i) & (ii)). *But see Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 397-98 (8th Cir. 1996) (discussing prevailing party for purposes of awarding attorneys' fees).

In addition, the ADA provides a "good faith" defense if an employer "demonstrates good faith efforts" to find a reasonable accommodation with the plaintiff. *See* 42 U.S.C § 1981a(a)(3) and Model Instruction 5.57, *infra*. If the jury finds that the employer has made such efforts, the plaintiff cannot recover compensatory or punitive damages. *See* 42 U.S.C. § 1981a(a)(3).

5.51A ADA - DISPARATE TREATMENT - ESSENTIAL ELEMENTS (ACTUAL DISABILITY)

Your verdict must be for plaintiff and against defendant if all of the following elements have been proved by the [(greater weight) (preponderance)][1] of the evidence:

First, plaintiff had (specify alleged impairment(s));[2] and

Second, such (specify alleged impairment(s)) substantially limited plaintiff's ability to (specify major life activity or activities affected); and[3]

Third, defendant (specify action(s) taken with respect to plaintiff)[4]; and

Fourth, plaintiff could have performed the essential functions[5] of (specify job held or position sought)[6] at the time defendant (specify action(s) taken with respect to plaintiff) and

Fifth, defendant knew[7] of plaintiff's (specify alleged impairment(s)) and plaintiff's (specify alleged impairment(s)) [was a motivating factor][8] [played a part][9] in defendant's decision to (specify action(s) taken with respect to plaintiff).

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence [or if defendant is entitled to a verdict under (describe instruction)],[~~9~~ 10] then your verdict must be for defendant. [You may find that plaintiff's (specify alleged impairment(s)) [was a motivating factor] [played a part] in defendant's (decision)[11] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [12]

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

2. In a typical case, the plaintiff will allege discrimination on the basis of an actual disability. *See* 42 U.S.C. § 12102(2)(A). In such cases, the name of the condition is not essential as long as the specified condition fits the definition of an impairment as used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (quoting 29 C.F.R. § 1630 App., §

1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing "undue emphasis" on one party's evidence).

As discussed in the Committee Comments, however, if the plaintiff contends that he or she had a record of a disability, the language of the instruction will have to be modified. *See* 42 U.S.C. § 12102(2)(B). For cases in which the plaintiff alleges that he or she was regarded by the defendant as having a disability, *see infra* Model Instruction 5.51(B). *See id.* § 12102(2)(C).

3. This element is designed to submit the issue of whether the plaintiff's alleged impairment constitutes a "disability" under the ADA. If necessary, the phrase "substantially limits" may be defined. *See infra* Model Instruction 5.52(C).

4. Insert the appropriate language depending on the nature of the case (*e.g.*,"discharge," "failure to hire," "failure to promote," or "demotion" case). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction ~~{5.59}~~ 5.93.

5. This element is designed to submit the issue of whether the plaintiff is a "qualified individual" under the ADA. If necessary, the phrase "essential functions" may be defined. *See infra* Model Instruction 5.52(B).

6. In a discharge or demotion case, specify the position held by the plaintiff. In a failure-to-hire or failure-to-promote case, specify the position for which the plaintiff applied. *See Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575-76 (8th Cir. 2000) (agreeing with district court's assessment that it could not evaluate whether plaintiff was a qualified individual within the meaning of the ADA because plaintiff failed to identify any particular job for which she was qualified).

7. This language may need to be modified if there is a dispute whether the defendant had adequate knowledge of the plaintiff's impairment. *See Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that an employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of her disabling condition even though the employer had some awareness of the plaintiff's health problems). *See also Miller v. National Casualty Co.*, 61 F.3d 627, 630 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 934 (7th Cir. 1995))). For more discussion on this issue, see section 5.50.

8. The phrase "motivating factor" is the proper phrase to use in the instruction, *see Pedigo v. P.A.M. Transport Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), and the Committee recommends that the definition set forth in Model Instruction 5.96, *infra*, be given.

9. *See* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

10. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(c)(1)); infectious or communicable disease (42 U.S.C. § 12113(d)(2)); illegal use of drugs (42 U.S.C. 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

11. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

12. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

This instruction is designed to submit cases in which the primary issue is whether the plaintiff's disability was a motivating factor in the employment decision. The instruction may be modified if the plaintiff alleges that he or she has a record of a disability. *See* 42 U.S.C. § 12102(2)(B); 29 C.F.R. § 1630.2(g). If the plaintiff alleges that he or she did not have an actual disability, but that he or she was regarded by the defendant as having a disability, *see* 42 U.S.C. § 12102(2)(C), the appropriate instruction for use is Model Instruction 5.51(B), *infra*.

The *McDonnell Douglas* burden-shifting scheme applies in analyzing claims of intentional discrimination under the ADA. *See, e.g., Christopher v. Adam's Mark Hotels*, 137 F.3d 1069, 1071 (8th Cir. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). It is unnecessary and inadvisable, however, to instruct the jury regarding the *McDonnell Douglas* analysis. *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) ("Reference to this complex analysis is not necessary . . . or even recommended."); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir. 1992) ("[T]he *McDonnell Douglas* 'ritual is not well suited as a detailed instruction to the jury' and adds little understanding to deciding the ultimate question of discrimination.") (quoting *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 (8th Cir. 1985)). Instead, the submission to the jury should focus on the ultimate issues of whether intentional discrimination was a motivating factor in

the defendant's employment decision. *See Lang*, 107 F.3d at 1312 ("Model instruction § 5.91 properly focuses on the single ultimate factual issue for the jury--whether the plaintiff is a victim of intentional discrimination . . . .").

5.51B ADA-- DISPARATE TREATMENT - ESSENTIAL ELEMENTS (PERCEIVED DISABILITY)

Your verdict must be for plaintiff and against defendant if all of the following elements have been proved by the [(greater weight) (preponderance)][1] of the evidence:

First, defendant regarded plaintiff's (specify alleged impairment(s))[2] as substantially limiting plaintiff's ability to (specify major life activity or activities defendant allegedly believed were affected); and[3]

Second, defendant (specify action(s) taken with respect to plaintiff)[4] and

Third, plaintiff could have performed the essential functions[5] of (specify job held or position sought)[6] at the time defendant (specify action(s) taken with respect to plaintiff); and

Fourth, plaintiff's (specify alleged impairment(s)) [was a motivating factor][7] [played a part][8] in defendant's decision to (specify action(s) taken with respect to plaintiff).

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence [or if defendant is entitled to a verdict under (describe instruction)],[~~8~~ 9] then your verdict must be for defendant. [You may find that plaintiff's (specify alleged impairment(s)) [was a motivating factor] [played a part] in defendant's (decision)[10] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [11]

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

2. It may be that in the majority of "perceived disability" cases, the plaintiff has an actual impairment, although the impairment does not substantially limit any of the plaintiff's major life activities. *See* 29 C.F.R. § 1630.2(l)(1) (explaining that a person is "regarded as" having an impairment that substantially limits a major life activity "if he or she has a physical or mental impairment that does not substantially limit major life activities but is treated . . . as constituting such limitation").

In such cases, the name of the condition is not essential as long as the specified condition fits the definition of an impairment as used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627

(8th Cir. 1997) ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing "undue emphasis" on one party's evidence).

3. This element is designed to submit the issue of whether the plaintiff has a "disability" within the meaning of the ADA because the defendant regarded plaintiff as having a substantially limiting impairment. *See* 42 U.S.C. § 12102(2)(C). If necessary, the phrase "substantially limits" may be defined. *See infra* Model Instruction 5.52(C).

4. Insert the appropriate language depending on the nature of the case (*e.g.*,"discharge," "failure to hire," "failure to promote," or "demotion" case). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.59.

5. This element is designed to submit the issue of whether the plaintiff is a "qualified individual" under the ADA. If necessary, the phrase "essential functions" may be defined. *See infra* Model Instruction 5.52(B).

6. In a discharge or demotion case, specify the position held by the plaintiff. In a failure-to-hire or failure-to-promote case, specify the position for which the plaintiff applied. *See Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575-76 (8th Cir. 2000) (agreeing with district court's assessment that it could not evaluate whether plaintiff was a qualified individual within the meaning of the ADA because plaintiff failed to identify any particular job for which she was qualified).

7. The phrase "motivating factor" is the proper phrase to use in the instruction, *see Pedigo v. P.A.M. Transport Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), and the Committee recommends that the definition set forth in Model Instruction 5.96, *infra*, be given.

8. *See* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

9. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(c)(1)); infectious or communicable disease (42 U.S.C. § 12113(d)(2)); illegal use of drugs (42 U.S.C. 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

10. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

11. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

This instruction is designed to submit cases in which the primary issue is whether the plaintiff's perceived disability was a motivating factor in the employment decision. *See* 42 U.S.C. § 12102(2)(C).

The *McDonnell Douglas* burden-shifting scheme applies in analyzing claims of intentional discrimination under the ADA. *See, e.g., Christopher v. Adam's Mark Hotels*, 137 F.3d 1069, 1071 (8th Cir. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). It is unnecessary and inadvisable, however, to instruct the jury regarding the *McDonnell Douglas* analysis. *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) ("Reference to this complex analysis is not necessary . . . or even recommended."); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir. 1992) ("[T]he *McDonnell Douglas* 'ritual is not well suited as a detailed instruction to the jury' and adds little understanding to deciding the ultimate question of discrimination.") (quoting *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 (8th Cir. 1985)). Instead, the submission to the jury should focus on the ultimate issues of whether intentional discrimination was a motivating factor in the defendant's employment decision. *See Lang*, 107 F.3d at 1312 ("Model instruction § 5.91 properly focuses on the single ultimate factual issue for the jury--whether the plaintiff is a victim of intentional discrimination . . . .").

5.51A/B(1) ADA--DISPARATE TREATMENT "SAME DECISION" INSTRUCTION

If you find in favor of plaintiff under Instruction ___,[1] then you must answer the following question in the verdict form[s]: Has it been proved by the [(greater weight) (preponderance)][2] of the evidence that defendant would have (specify action taken with respect to plaintiff) even if defendant had not considered plaintiff's (specify alleged impairment)?

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

Committee Comments

If a plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor," the defendant nevertheless may avoid an award of damages or reinstatement by showing that it would have taken the same action "in the absence of the impermissible motivating factor." *See* 42 U.S.C. § 2000e-5(g)(2)(B). This instruction is designed to submit this "same decision" issue to the jury. *See Doane v. City of Omaha*, 115 F.3d 624, 629 (8th Cir. 1997) (discussing remedies available in "mixed motive" case under ADA); *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995) (same). *See also Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 396-97 (8th Cir. 1996) (discussing "prevailing party" for purposes of awarding attorneys' fees).

5.51C ADA - REASONABLE ACCOMMODATION CASES (Specific Accommodation Identified)

Your verdict must be for plaintiff and against defendant if all of the following elements have been proved by the [(greater weight) (preponderance)][1] of the evidence:

First, plaintiff had (specify alleged impairment(s));[2] and

Second, such (specify alleged impairment(s)) substantially limited plaintiff's ability to (specify major life activity or activities affected); and[3]

Third, defendant knew[4] of plaintiff's (specify alleged impairment(s)); and

Fourth, plaintiff could have performed the essential functions[5] of the (specify job held or position sought) at the time defendant (specify action(s) taken with respect to plaintiff) if plaintiff had been provided with (specify accommodation(s) identified by plaintiff)[6]; and

Fifth, providing (specify accommodation(s) identified by plaintiff) would have been reasonable; and

Sixth, defendant failed to provide (specify accommodation(s) identified by plaintiff) and failed to provide any other reasonable accommodation.[7]

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence [or if defendant is entitled to a verdict under (describe instruction)], [8] then your verdict must be for defendant.

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

2. The name of the condition is not essential as long as the specified condition fits the definition of an impairment as used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing "undue emphasis" on one party's evidence).

3. This element is designed to submit the issue of whether the plaintiff's alleged impairment constitutes a "disability" under the ADA. If necessary, the phrase "substantially limits" may be defined. *See infra* Model Instruction 5.52(C).

4. This language may need to be modified if there is a dispute whether the defendant had adequate knowledge of the plaintiff's impairment. *See Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that an employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of her disabling condition even though the employer had some awareness of the plaintiff's health problems). *See also Miller v. National Casualty Co.*, 61 F.3d 627, 630 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 934 (7th Cir. 1995))). For more discussion on this issue, see section 5.50.

5. This element is designed to submit the issue of whether the plaintiff is a "qualified individual" under the ADA. If necessary, the phrase "essential functions" may be defined. *See infra* Model Instruction 5.52(B).

6. It may be that in the majority of cases, the plaintiff requests the provision of a specific accommodation (*e.g.*, a modified work schedule). In some cases, however, the plaintiff may simply notify the employer of his or her need for an accommodation in general. In such cases, the language of the instruction should be modified.

7. An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.'").

8. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(c)(1)); infectious or communicable disease (42 U.S.C. § 12113(d)(2)); illegal use of drugs (42 U.S.C. § 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

Committee Comments

The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). Although many individuals with disabilities are qualified to perform the essential functions of jobs without need of any accommodation, this instruction is designed for use in cases in which the nature or extent of accommodations provided to an otherwise qualified individual is in dispute. For a discussion of the "interactive process" in which employers and employees may be required to engage to determine the nature and extent of accommodations needed, see section 5.50.

The term "accommodation" means making modifications to the work place which allows a person with a disability to perform the essential functions of the job or allows a person with a disability to enjoy the same benefits and privileges as an employee without a disability. *See Kiel*, 169 F.3d at 1136 ("A reasonable accommodation should provide the disabled individual an equal employment opportunity, including an opportunity to attain the same level of performance, benefits, and privileges that is available to similarly situated employees who are not disabled.").

A "reasonable" accommodation is one that could reasonably be made under the circumstances and may include but is not limited to: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. 29 C.F.R. § 1630.2(o); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-13 (8th Cir. 1995).

Although part-time work and job restructuring may be considered reasonable accommodations, "[t]his does not mean an employer is required to offer those accommodations in every case." *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575 (8th Cir. 2000). Moreover, although job restructuring is a possible accommodation under the ADA, an employer need not reallocate the essential functions of a job. *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999); *Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084 (8th Cir. 2000); *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575 (8th Cir. 2000); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Benson*, 62 F.3d at 1112-13 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)). In addition, an employer is not obligated to hire additional employees or reassign existing workers to assist an employee. *Fjellestad*, 188 F.3d at 950 (citing *Moritz*, 124 F.3d at 788).

Reassignment to a vacant position is another possible accommodation under the ADA. *Benson*, 62 F.3d at 1114 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)); *see also Fjellestad*, 188 F.3d at 950-51 (plaintiff created genuine issue of material fact as to whether employer could have reassigned her to a specific, vacant position). In fact, the Eighth Circuit has recognized that, in certain circumstances, reassignment to a vacant position may be "necessary" as a reasonable

accommodation. *See Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1018 (8th Cir. 2000). The scope of the reassignment duty is limited, however. *Id.* at 1019. For example, reassignment is an accommodation of "last resort"; that is, the "very prospect of reassignment does not even arise unless accommodation within the individual's current position would pose an undue hardship." *Id.* Moreover, the ADA does not require an employer to create a new position as an accommodation. *Id.*; *see also Treanor*, 200 F.3d at 575 ("[T]he ADA does not require an employer to create a new part-time position where none previously existed."); *Fjellestad*, 188 F.3d at 950 (employer not required to create new position or to create permanent position out of a temporary one). In addition, an employer is not required to "bump" another employee in order to reassign a disabled employee to that position. *Cravens*, 214 F.3d at 1019. Promotion is not required. *Id.* Finally, the employee must be "otherwise qualified" for the reassignment position. *Id.*

An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.'").

An employer's showing that the requested accommodation would violate the rules of an existing seniority system (*e.g.*, an employee's request to remain at a lighter duty position in the mailroom, in disregard of more senior employees' rights to "bid in" to that position) is ordinarily enough to show that the accommodation is not "reasonable" and to entitle the employer to summary judgment. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394, 403-04, 122 S. Ct. 1516, 1519, 1524 (2002). The employee may defeat summary judgment and create a jury question by presenting evidence of special circumstances that make an exception to a seniority rule "reasonable" in the particular case. *Id.* at 1519, 1525. Examples of special circumstances are the employer's fairly frequent exercise of a right to change the seniority system unilaterally and a seniority system containing exceptions such that one further exception is unlikely to matter. *Id*. at 1525.

The ADA does not require the preferential treatment of individuals with disabilities in terms of job qualifications as a reasonable accommodation. *See Harris v. Polk County*, 103 F.2d 696, 697 (8th Cir. 1996) (employer lawfully denied job to disabled applicant on basis of criminal record which allegedly had resulted from prior psychological problems because "an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees").

In some cases, the timing of the plaintiff's alleged disability is critical. If necessary, the language may be modified to incorporate the relevant time frame of the plaintiff's alleged disability.

5.52A DISABILITY

[no definition recommended]

Committee Comments

As drafted, the Model Instructions do not use the term "disability" and, thus, do not require the jury to determine whether a plaintiff has a "disability." Rather, the instructions require the jury to find the facts which support the underlying elements of a disability under the Act.

5.52B ESSENTIAL FUNCTIONS

In determining whether a job function is essential, you should consider the following factors: [(1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of persons who have held the job; (7) the current work experience of persons in similar jobs; (8) whether the reason the position exists is to perform the function; (9) whether there are a limited number of employees available among whom the performance of the function can be distributed; (10) whether the function is highly specialized and the individual in the position was hired for his or her expertise or ability to perform the function; and (11) (list any other relevant factors supported by the evidence)].[1]

No one factor is necessarily controlling. You should consider all of the evidence in deciding whether a job function is essential.

The term "essential functions" means the fundamental job duties of the employment position the plaintiff holds or for which the plaintiff has applied. The term "essential functions" does not include the marginal functions of the position.

Notes on Use

1. This instruction should be modified, as appropriate, to include only those factors supported by the evidence.

Committee Comments

The ADA protects only those individuals who, with or without reasonable accommodation, can perform the essential functions of the employment position that the plaintiff holds or desires. *See* 42 U.S.C. § 12111(8); *Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084 (8th Cir. 2000); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 786-87 (8th Cir. 1998); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-13 (8th Cir. 1995). Thus, this instruction is designed for use in connection with the essential elements instruction in cases where the issue of whether a particular job requirement or task is an "essential function" of the job is in dispute. The instruction, although not technically a definition, should be used to instruct the jury in determining whether a given job duty is essential.

The instruction is based on 29 C.F.R. § 1630.2(n) and the Eighth Circuit's opinions in *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445-46 (8th Cir. 1998) ("An employer's identification of a position's "essential functions" is given some deference under the ADA."); *Moritz*, 147 F.3d at 787; and *Benson*, 62 F.3d at 1113.

5.52C SUBSTANTIALLY LIMITS

The phrase "substantially limits" as used in these instructions means an individual is [unable to perform (specify major life activity affected)] [significantly restricted in the ability to perform (specify major life activity affected)].[1]

In determining whether the plaintiff's impairment substantially limits plaintiff's ability to (specify major life activity affected), you should compare the plaintiff's ability to (specify major life activity affected) with that of the average person. In doing so, you should also consider: (1) the nature and severity of the impairment; (2) how long the impairment will last or is expected to last; and (3) the permanent or long-term impact, or expected impact, of the impairment. [Temporary impairments with little or no long-term impact are not sufficient.][2]

It is not the name of an impairment or a condition that matters, but rather the effect of an impairment or condition on the life of a particular person.

Notes on Use

1. Select the bracketed language that is supported by the evidence.
2. Use the bracketed language only if it is supported by the evidence.

Committee Comments

This instruction is designed for use in connection with the essential elements instruction in cases in which the issue of whether plaintiff has a disability under the ADA is in dispute. The language of the instruction is based on 29 C.F.R. § 1630.2(j). The term "substantially limits" may be of such common usage that a definition is not required. If the Court desires to define the term, however, the Committee recommends this definition. The instruction will need to be modified in cases where the plaintiff claims that the defendant "regarded" plaintiff as having a substantially limiting impairment.

An impairment is only a disability under the ADA if it substantially limits one or more major life activities. *See* 42 U.S.C. § 12102(2). The phrase "substantially limits" means that an individual is (i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a major life activity. 29 C.F.R. § 1630.2(j)(1); *Fjellestad v. Pizza Hut of Am, Inc.*, 188 F.3d 944, 948-49 (8th Cir. 1999); *Snow v. Ridgeway Med. Ctr.*, 128 F.3d 1201, 1206 (8th Cir. 1997); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997).

The United States Supreme Court has held that a physical or mental impairment that is corrected by medication, the body's own systems, or other measures does not "substantially limit" a major life activity. *See Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *accord Spades v. City of Walnut Ridge*, 186 F.3d 897, 899-900 (8th Cir. 1999) (alleged disability of depression did not substantially limit any of plaintiff's major life activities where plaintiff conceded that resort to medicines and counseling allowed him to function without limitation); *Cooper v. Olin Corp.*, 246 F.3d 1083, 1088-89 (8th Cir. 2001) (depression did not substantially limit plaintiff's major life activities where she lived alone, handled her own finances, operated heavy equipment and cared for animals, home and farmland); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8th Cir. 2002) (pharmacist, whose diabetes was treated with insulin and diet, failed to demonstrate that his condition substantially limited his major life activities; court could not consider what could or would occur if plaintiff stopped treating his diabetes or how it might develop in the future).

The following factors are relevant in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2); *Fjellestad*, 188 F.3d at 949; *Snow*, 128 F.3d at 1207; *Helfter*, 115 F.3d at 616; *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996). Temporary, non-chronic impairments of short duration with little or no long-term or permanent impact are usually not disabilities. *See Gutridge v. Clure*, 153 F.3d 898, 901-02 (8th Cir. 1998) (citing 29 C.F.R. § 1630 App., § 1630.2(j); *Heintzelman v. Runyon*, 120 F.3d 143, 145 (8th Cir. 1997)).

If the plaintiff alleges that he or she is substantially limited in the major life activity of working, a separate instruction may need to be given. Generally, the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. *Snow*, 128 F.3d at 1206 (citing 29 C.F.R. § 1630.2(j)(3)(i)); *Aucutt*, 85 F.3d at 1319 (same); *accord Fjellestad*, 188 F.3d at 949 ("Finding that an individual is substantially limited in his or her ability to work requires a showing that his or her overall employment opportunities are limited."). Rather, a person must show the impairment significantly restricts his or her ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *Snow*, 128 F.3d at 1206-07 (citing 29 C.F.R. § 1630.2(j)(3)(i)); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996) (same); *accord Shipley v. City of University City*, 195 F.3d 1020, 1022-23 (8th Cir. 1999) (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, ~~{___}~~490-94, 119 S. Ct. 2139, 2150-52 (1999)); *Fjellestad*, 188 F.3d at 949.

The following factors are relevant in determining whether a person is substantially limited in the major life activity of working: (1) the number and type of jobs from which the individual has been disqualified because of the impairment; (2) the geographical area to which the individual has reasonable access; and (3) the individual's job training, experience and expectations. 29 C.F.R. § 1630.2(j)(3);

Fjellestad, 188 F.3d at 949; *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 617 (8th Cir. 1997); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996).

A plaintiff who alleges a substantial limitation in the major life activity of performing manual tasks must show an impairment restricting his or her ability to perform "the types of manual tasks of central importance to people's daily lives," such as "household chores, bathing and brushing one's teeth," rather than simply an inability to perform the manual tasks unique to a particular job. *Toyota Motor Mfg. v. Williams*, 584 U.S. 184, 202, 122 S. Ct. 681, 693 (2002). Thus, in *Toyota Motor Mfg. v. Williams*, an employee with carpal tunnel syndrome could not establish disability simply by showing that she could not do repetitive work with hands and arms extended at or above shoulder levels for extended periods of time, as required by her specialized assembly line job. *Id. See also Fenney v. Dakota, Minnesota & Eastern Railroad Co.*, 327 F.3d 707, 715 (8th Cir. 2003), holding that *Toyota's* analysis is not limited to the activity of performing manual tasks, and that a plaintiff claiming substantial limitation in caring for himself was required to "demonstrate that his impairment 'prevents or severely restricts' his ability to care for himself compared with how unimpaired individuals normally care for themselves in daily life."

Ultimately, "a court must ask 'whether the particular impairment constitutes for the particular person a significant barrier to employment.'" *Webb*, 94 F.3d at 488 (quoting *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986)). The courts caution, however, that "'working' does not mean working at a particular job of that person's choice." *Smith v. City of Des Moines*, 99 F.3d 1466, 1474 (8th Cir. 1996) (quoting *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995)).

5.53A "UNDUE HARDSHIP" -- STATUTORY DEFENSE

Your verdict must be in favor of the defendant if it has been proved by the [(greater weight) (preponderance)][1] of the evidence that providing (specify accommodation) would cause an undue hardship on the operation of defendant's business.

The term "undue hardship," as used in these instructions, means an action requiring defendant to incur significant difficulty or expense when considered in light of the following:

[(1) the nature and cost of (specify accommodation);

(2) the overall financial resources of the facility involved in the provision of (specify accommodation), the number of persons employed at such facility and the effect on expenses and resources;

(3) the overall financial resources of the defendant;

(4) the overall size of the business of defendant with respect to the number of its employees and the number, type and location of its facilities;

(5) the type of operation of the defendant, including the composition, structure, and functions of the workforce;

(6) the impact of (specify accommodation) on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business;

and (list any other relevant factors supported by the evidence)].[2]

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

2. This instruction should be modified, as appropriate, to include only those factors supported by the evidence.

Committee Comments

Under the ADA, an employer must provide a reasonable accommodation to the known physical limitations of a qualified applicant or employee with a disability unless it can show that the

accommodation would impose an undue hardship on the business. *See* 42 U.S.C. § 12111(9) and Model Instruction 5.51(B), *infra*, Committee Comments. Thus, this instruction should be used to submit the defense of undue hardship. *See* 42 U.S.C. § 12111(10).

Eighth Circuit case law holds that the defendant in any civil case is entitled to a specific instruction on its theory of the case, if the instruction is "legally correct, supported by the evidence and brought to the court's attention in a timely request." *Des Moines Bd. of Water Works v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983).

5.53B "DIRECT THREAT" -- STATUTORY DEFENSE

Your verdict must be in favor of the defendant if it has been proved by the [(greater weight) (preponderance)][1] of the evidence that

First, defendant (specify action(s) taken with respect to plaintiff) because plaintiff posed a direct threat to the health or safety of ~~{others}~~[(plaintiff) (others) (plaintiff or others)[2]] in the workplace; and

Second, such direct threat could not be eliminated [3] by reasonable accommodation.

A direct threat means a significant risk of substantial harm to the health or safety of the person or other persons that cannot be eliminated by reasonable accommodation. The determination that a direct threat exists must be based on ~~{a specific personal}~~ an individualized assessment of the plaintiff's present ability to safely perform the essential functions of the job. ~~{This assessment of the plaintiff's ability must be based on either a reasonable medical judgment that relies on the most current medical knowledge, or on the best available objective evidence.}~~

In determining whether a person poses a direct threat, you must consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the likely time before the potential harm occurs.

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

2. Select the word or phrase that best describes defendant's theory.

3. The term "direct threat" is defined by the ADA as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *See* 42 U.S.C. § ~~{12113 (b)}~~ 12111 (3). The applicable regulations define "direct threat" as a "significant risk of substantial harm to the health or safety *of the individual* or others that cannot be eliminated *or reduced* by reasonable accommodation." *See* 29 C.F.R. § 1630.2(r) (emphasis added).

~~{This regulatory expansion of the ADA to include an employee being a threat to himself or herself, as well as to others, has been rejected by at least one court. *See Kohnke v. Delta Airlines, Inc.*, 932 F. Supp. 1110 (N.D. Ill. 1996).}~~

Committee Comments

This instruction should be used in submitting the defense of direct threat. *See* 42 U.S.C. § 12111(3); 29 C.F.R. 1630.2(r). Eighth Circuit case law holds that the defendant in any civil case is entitled to a specific instruction on its theory of the case, if the instruction is "legally correct, supported by the evidence and brought to the court's attention in a timely request." *Des Moines Bd. of Water Works v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983).

Under the ADA, an employer may apply its qualification standards, tests, or selection criteria to screen out, deny a job to, or deny a benefit of employment to a disabled person, if such criteria are job-related and consistent with business necessity and if the person cannot perform the essential function of the position with reasonable accommodation. 42 U.S.C. § 12113(a); *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1283-84 (7th Cir. 1995).

The ADA includes within the term "qualification standards" the requirement that the employee not pose a direct threat to the health or safety of other individuals in the workplace. *See* 42 U.S.C. § 12133(b). ~~{At least one court has rejected the language of 29 C.F.R. § 1630.2(r) which expands the ADA to include the employee being a direct threat to himself or herself. See Kohnke v. Delta Airlines, Inc., 932 F. Supp. 1110, 1111-12 (N.D. Ill. 1996). That court, however, held that a qualification standard which proscribed an employee being a direct threat to himself, as well as others in the workplace, could pass muster under the more general provision of 42 U.S.C. § 12113(a).}~~ The Supreme Court has upheld 29 C.F.R. §§ 1630.2(r) and 1630.15(b)(2), which also allow an employer to adopt a qualification standard requiring that the individual not pose a direct threat to his or her own safety. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 78, 122 S. Ct. 2045, 2049 (2002).

For a discussion of the "direct threat" defense in the health care context, *see Bragdon v. Abbott*, 524 U.S. 624, ~~{___}~~649-50, 118 S. Ct. 2196, 2210 (1998) (health care professional has duty to assess risk based on objective, scientific information available to him or her and others in profession).

5.54A ACTUAL DAMAGES

If you find in favor of plaintiff under Instruction ___[1] [and if you answer "no" in response to Instruction ___,][2] then you must award plaintiff such sum as you find by the [(greater weight) (preponderance)][3] of the evidence will fairly and justly compensate plaintiff for any damages you find plaintiff sustained as a direct result of [describe defendant's decision--e.g., "defendant's failure to hire plaintiff"]. Plaintiff's claim for damages includes three distinct types of damages and you must consider them separately.

First, you must determine the amount of any wages and fringe benefits[4] plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge] through the date of your verdict,[5] *minus* the amount of earnings and benefits that plaintiff received from other employment during that time.

Second, you must determine the amount of any other damages sustained by plaintiff, such as [list damages supported by the evidence].[6] You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.[7]

[You are also instructed that plaintiff has a duty under the law to "mitigate" [his/her] damages--that is, to exercise reasonable diligence under the circumstances to minimize [his/her] damages. Therefore, if you find by the [(greater weight) (preponderance)] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [him/her], you must reduce [his/her] damages by the amount [he/she] reasonably could have avoided if [he/she] had sought out or taken advantage of such an opportunity.][8]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][9]

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction here. Even if the jury finds that the defendant would have made the same decision regardless of plaintiff's disability, the Court may direct the jury to determine the amount of damages, if any, sustained by the plaintiff. This approach will protect against the necessity of a retrial of the case in the event the underlying liability determination is reversed on appeal.

3. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

4. When certain benefits, such as employer-subsidized health insurance, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1062 (8th Cir. 2002) (discussing lost benefits in ADEA case); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1111 (8th Cir. 1994) (allowing insurance replacement costs, lost 401(k) contributions in ADEA case).

5. Front pay is an equitable issue for the judge to decide. *Salitros v. Chrysler Corp.*, 306 F.3d 562, 571 (8th Cir. 2002). In some cases, the defendant will assert some independent post-discharge reason--such as a plant closing or sweeping reduction in force--as to why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). In those cases, this instruction must be modified to submit this issue for the jury's determination.

6. Under the Civil Rights Act of 1991, a prevailing ADA plaintiff may recover damages for mental anguish and other personal injuries. The types of damages mentioned in § 1981a(b)(3) include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." For cases involving the provision of a reasonable accommodation (Model Instruction 5.51(C), *infra*), the plaintiff may not recover such damages if the defendant demonstrated "good faith efforts" to arrive at a reasonable accommodation with the plaintiff. *See infra* Model Instruction 5.57.

7. If the issue of "front pay" is submitted to the jury, it should be distinguished from an award of compensatory damages, which is subject to the statutory cap. *See infra* Committee Comments. Accordingly, separate categories of damages must be identified.

8. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983); *Fieldler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982).

9. This paragraph may be given at the trial court's discretion.

Committee Comments

Employment Cases ~~-- Element and Damage Instructions~~

The Civil Rights Act of 1991 makes three significant changes in the law regarding the recovery of damages in Title VII cases. First, the plaintiff prevails on the issue of liability by showing that unlawful discrimination was a "motivating factor" in the relevant employment decision; however, the plaintiff cannot recover any actual damages if the employer shows that it would have made the same employment decision even in the absence of any discriminatory intent. 42 U.S.C. § 2000e-2(g)(2)(B). Second, the Civil Rights Act permits the plaintiff to recover general compensatory damages in addition to the traditional employment discrimination remedy of back pay and lost benefits. *Id.* § 1981a(a). Third, the Act expressly limits the recovery of general compensatory damages to certain dollar amounts, ranging from $50,000 to $300,000 depending upon the size of the employer. *Id.* § 1981a(b).

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982). This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Industries*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same). *But see Blum v. Witco Chemical Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same). However, because Title VII, as amended by the Civil Rights Act of 1991, no longer limits recovery of damages, the instruction permits the recovery of general damages for pain, suffering, humiliation, and the like.

Because the law imposes a limit on general compensatory damages but does not limit the recovery of back pay and lost benefits, the Committee believes that these types of damages must be considered and assessed separately by the jury. Otherwise, if the jury awarded a single dollar amount, it would be impossible to identify the portion of the award that was attributable to back pay and the portion that was attributable to "general damages." As a result, the trial court would not be able to determine whether the jury's award exceeded the statutory limit.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, front pay is an issue for the court, not the jury. *Salitros v. Chrysler Corp.*, 306 F.3d 562, 571 (8th Cir. 2002). If the trial court submits the issue of

front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

In *Kramer v. Logan County School Dist. No. R-1*, 157 F.3d 620, 625-26 (8th Cir. 1998), the court ruled that "front pay is an equitable remedy excluded from the statutory limit on compensatory damages provided for in [42 U.S.C.] § 1981a(b)(3)."

Although the Civil Rights Act of 1991 expressly limits the amount of compensatory and punitive damages depending upon the size of the employer, the jury shall not be advised on any such limitation. 42 U.S.C. § 1981a(c)(2). Instead, the trial court will simply reduce the verdict by the amount of any excess.

5.54B NOMINAL DAMAGES

If you find in favor of plaintiff under Instruction ___[1] [and if you answer "no" in response to Instruction ___,][2] but you do not find that plaintiff's damages have ~~no~~ monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar ($1.00).[3]

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction here. Even if the jury finds that the defendant would have made the same decision regardless of plaintiff's disability, the Court may direct the jury to determine the amount of damages, if any, awarded to the plaintiff. This approach will protect against the necessity of a retrial of the case in the event the underlying liability determination is reversed on appeal.

3. One dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value of the harm that the plaintiff suffered from the violation of his rights. *Dean v. Civiletti*, 670 F.2d 99, 101 (8th Cir. 1982) (Title VII); *cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value of the harm suffered by the plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some case, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

5.54C PUNITIVE DAMAGES

In addition to actual [and nominal] damages mentioned in the other instructions, the law permits the jury under limited circumstances to award an injured person punitive damages.

If you find in favor of plaintiff under Instruction _____,[1] and if you answer "no" in response to Instruction _____,[2] then you must decide whether defendant acted with malice or reckless indifference to plaintiff's right not to be discriminated against[3] on the basis of [his/her] (specify alleged impairment(s)). Defendant acted with malice or reckless indifference if:

> it has been proved by the [(preponderance) or (greater weight)] of the evidence that [insert the name(s) of the defendant or manager[4] who terminated[5] plaintiff's employment] knew that the (termination)[5] was in violation of the law prohibiting disability discrimination, or acted with reckless disregard of that law.

[However, you may not award punitive damages if it has been proved by the [(preponderance) or (greater weight)] of the evidence [that defendant made a good-faith effort to comply with the law prohibiting disability discrimination]][6].

If you find that defendant acted with malice or reckless disregard [and did not make a good faith effort to comply with the law,][6] then, in addition to any actual [or nominal] damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or to deter defendant and others from like conduct in the future. Whether to award plaintiff punitive damages, and the amount of those damages, are within your discretion.

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.][7]

Notes on Use

1. Fill in the number or title of the essential elements instruction here. *See infra* Model Instructions 5.51(A), 5.51(B) and 5.51(C).

2. Fill in the number or title of the "same decision" instruction if applicable. *See infra* Model Instruction 5.51(A/B)(1).

3. Although a finding of discrimination ordinarily subsumes a finding of intentional misconduct, this language is included to emphasize the threshold for recovery of punitive damages. Under the Civil Rights Act of 1991, the standard for punitive damages is whether the defendant acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights." Civil Rights Act of 1991, § 102 (codified at 42 U.S.C. § 1981a(b)(1)).

4. Use the name of the defendant, the manager who took the action, or other descriptive phrase such as "the manager who fired plaintiff."

5. This language is designed for use in a discharge case. In a "failure to hire," "failure to promote," "demotion," or "constructive discharge" case, the language must be modified.

6. Use this phrase only if the good faith of defendant is to be presented to the jury. This two-part test was articulated by the United States Supreme Court in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). For a discussion of the case, see the Committee Comments. It is not clear from the case who bears the risk of nonpersuasion on the good faith issue. The Committee predicts that case law will place the burden on the defendant to raise the issue and prove it.

7. The bracketed language is available for use if punitive damage claims are submitted against more than one defendant.

Committee Comments

Under the Civil Rights Act of 1991, a Title VII or ADA plaintiff may recover damages by showing that the defendant engaged in discrimination "with malice or with reckless indifference to [his or her] federally protected rights." *See* 42 U.S.C. § 1981a(b)(1). *See also* Model Instruction 4.53, *infra*, on punitive damages and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In 1999, the United States Supreme Court explained that the terms "malice" and "reckless" ultimately focus on the actor's state of mind. *Kolstad v. American Dental Association*, 527 U.S. 526, 535 (1999). The Court added that the terms pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *Id.* To be liable for punitive damages, the employer must at least discriminate in the face of a perceived risk that its actions will violate federal law. *Id.* at 536. Rejecting the conclusion of the lower court that punitive damages were limited to cases involving intentional discrimination of an "egregious" nature, the Court held that a plaintiff is not required to show egregious or outrageous discrimination independent of the employer's state of mind. *Id.* at 546.

The *Kolstad* case also established a good-faith defense to place limits on an employer's vicarious liability for punitive damages. Recognizing that Title VII and the ADA are both efforts to promote prevention of discrimination as well as remediation, the Court held that an employer may not

be vicariously liable for the discriminatory decisions of managerial agents where those decisions are contrary to the employer's good faith efforts to comply with Title VII or the ADA. *Id.* at 545. The Court does not clarify which party has the burden of proof on the issue of good faith.

For cases involving the provision of a reasonable accommodation (*see infra* Model Instruction 5.51(C)),the plaintiff may not recover punitive damages if the defendant demonstrated "good faith efforts" to arrive at a reasonable accommodation with the plaintiff. *See infra* Model Instruction 5.57.

Under the ADA, as amended by the Civil Rights Act of 1991, the upper limit on an award including punitive and compensatory damages is $300,000. *See* 42 U.S.C. § 1981a(b)(3) (limiting the sum of compensatory and punitive damages awards depending on the size of the employer). For a discussion of submitting punitive damages to the jury under both state and federal law, see *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 575-78 (8th Cir. 1997).

5.55 "GOOD FAITH" DEFENSE TO COMPENSATORY AND PUNITIVE DAMAGES

If you find in favor of plaintiff under Instruction ___,[1] then you must answer the following question in the verdict form(s): Has it been proved by the [(greater weight) (preponderance)][2] of the evidence that the defendant made a good faith effort and consulted with the plaintiff, to identify and make a reasonable accommodation?

Notes on Use

1. Fill in the number or title of the "reasonable accommodation" essential elements instruction here (Model Instruction 5.51(C), *infra*).

2. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

Committee Comments

This instruction is designed for use in cases where a discriminatory practice involves the provision of a reasonable accommodation. The language is derived from 42 U.S.C. § 1981a(a)(3), which provides that the plaintiff may not recover damages if the defendant "demonstrates good faith efforts" to arrive at a reasonable accommodation with the plaintiff.

If the jury answers the above interrogatory in the affirmative, the plaintiff may still be entitled to attorneys' fees and nominal damages.

5.56 BUSINESS JUDGMENT INSTRUCTION

See Model Instruction 5.94. ~~You may not return a verdict for plaintiff just because you might disagree with defendant's (decision)† or believe it to be harsh or unreasonable.~~

~~**Notes on Use**~~

~~1. This instruction makes reference to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--is more appropriate.~~

~~**Committee Comments**~~

~~In *Walker v. AT&T Technologies*, 995 F.2d 846 (8th Cir. 1993), the Eighth Circuit ruled that it is reversible error to deny a defendant's request for an instruction which explains that an employer has the right to make subjective personnel decisions for any reason that is not discriminatory. Moreover, the Circuit has expressly approved the language of the instruction set forth here. *See Wolff v. Brown*, 128 F.3d 682, 685 (8th Cir. 1997) ("In an employment discrimination case, a business judgment instruction is 'crucial to a fair presentation of the case,' and the district court must offer it whenever it is proffered by the defendant."). *Cf. Blake v. J.C. Penney Co.*, 894 F.2d 274, 281 (8th Cir. 1990) (upholding a different business judgment instruction as sufficient).~~

~~{5.59 CONSTRUCTIVE DISCHARGE INSTRUCTION~~

~~See infra Model Instruction No. 5.93.~~
~~5.60 et seq. (Reserved for "Reasonable Accommodation" Cases under the Americans with Disabilities Act, 42 U.S.C. § 12101)}~~

5.60 RETALIATION UNDER EMPLOYMENT DISCRIMINATION STATUTES

Introductory Comment

The following instructions are designed for use in cases where the plaintiff alleges that he or she was discharged or otherwise retaliated against because he/she opposed an unlawful employment practice, or "participated in any manner" in a proceeding under one of the discrimination statutes. ~~See, e.g., 42 U.S.C. § 2000e-3(a).~~ Title VII, the Age Discrimination in Employment Act, The Americans With Disabilities Act, the Family and Medical Leave Act, and other federal employment laws expressly prohibit retaliation against employees who engage in "protected activity." See, e.g., 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 1223 (ADA); 29 U.S.C. § 2615 (FMLA). In addition, 42 U.S.C. § 1981 has been construed to prohibit retaliation against employees who engage in protected opposition against racial discrimination. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997).

This instruction is designed to submit the issue of liability in a retaliation case under Title VII and other federal discrimination laws. Retaliation claims require proof of three essential elements: (1) "protected activity" by the plaintiff; (2) subsequent "adverse employment action" by the employer; and (3) a causal connection between the plaintiff's protected activity and the adverse employment action. *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 478 (8th Cir. ~~June 1,~~ 2001); *Borgen v. Minnesota*, 236 F.3d 399 (8th Cir. 2000); *Cross v. Cleaver*, 142 F.3d 1059 (8th Cir. 1998); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997).

Protected Activity: Opposition

A retaliation plaintiff does not need to prove that the underlying employment practice by the employer was, in fact, unlawful; instead, employees are protected from retaliation if they oppose an employment practice which they reasonably and in good faith believe to be unlawful. See *Clark County School District v. Breeden*, 532 U.S. 268~~, 121 S. Ct. 1508~~ (~~April 23,~~ 2001); *Wentz v. Maryland Cas. Co.*, 869 F.2d 1153, 1155 (8th Cir. 1989) (ADEA case: "Contrary to the district court's ruling . . . to prove that he engaged in protected activity, Wentz need not establish that the conduct he opposed was, in fact, discriminatory.").

In order to be "protected activity," the employee's complaint must relate to unlawful employment practices; opposition to alleged discrimination against students or customers is not protected because it does not relate to an unlawful employment practice. *Artis v. Francis Howell*, 161 F.3d 1178 (8th Cir. 1998). As a general proposition, however, the threshold for engaging in "protected activity" is fairly low: the touchstone is simply whether the employee had a reasonable, good faith belief that the employer had committed an unlawful employment practice. *Stuart v. General Motors Corp.*, 217 F.3d 621, 634 (8th Cir. 2000); *Buettner v. Eastern Arch Coal Sales Co.*, 216 F.3d 707, 714 (8th Cir. 2000); *Wentz*, *supra*, 869 F.2d at 1155.

Protected Activity: Participation

In addition to prohibiting retaliation based on an employee's "opposition" to what he/she reasonably believes to be an unlawful employment practice, Title VII and other federal employment laws protect employees from retaliation based on their "participation" in proceedings under these statutes. E.g., 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203 (ADA). *Cross v. Cleaver*, *supra*, 142 F.3d at 1071. Protected "participation" appears to include filing a charge with the EEOC (or a parallel state or local agency), filing a lawsuit under one of the federal employment statutes, or serving as a witness in an EEOC case or discrimination lawsuit. Unlike "opposition" cases, employees who "participate" in these proceedings appear to have absolute protection from retaliation, irrespective of whether the underlying claim was made reasonably and in good faith. *Benson v. Little Rock Hilton Inn*, 742 F.2d 414 (8th Cir. 1984).

Adverse Employment Action

"Typically, it is obvious whether an employer took adverse employment action when, for example, the employee has been terminated or discharged. However, retaliatory conduct ~~"~~"may consist of action less severe than outright discharge.'" *Kim v. Nash Finch Co.*, ~~*supra*,~~ 123 F.3d at 1060. By way of example, the *Kim* decision held that the reduction of the plaintiff's "duties, disciplinary action and negative personnel reports, as well as required remedial training, constituted adverse employment action." *Id.*; *see also* *Ross v. Douglas County, Nebraska*, 234 F.3d 391, 395 (8th Cir. 2000) (even though plaintiff did not suffer any change in benefits or salary, plaintiff's reassignment to the "bubble," a position Douglas County routinely rotated employees through because of stressful nature of the duties, was sufficiently adverse); *Davis v. City of Sioux City*, 115 F.3d 1365, 1369 (~~Plaintiffs~~ transfer to a less desirable property officer position ~~submissible,~~ was actionable, despite defendant's argument that plaintiff received a salary increase). *Compare*, *LePique v. Hove*, 217 F.3d 1012 (8th Cir. 2000) (holding that failure to transfer plaintiff to a job that did not entail a change in salary, benefits or other aspects of employment is not sufficient "adverse" action).

Causal Connection

In most retaliation cases which proceed to trial, the focal issue is whether there ~~is~~ was a causal connection between the plaintiff's protected activity and the employer's adverse employment action. It has been held that timing alone may be insufficient to establish causation. Compare *Bradley v. Widnall*, 232 F.3d 626 (8th Cir. 2000); *Scroggins v. University of Minnesota*, 221 F.3d 1042 (8th Cir. 2000), with *Bassett v. City of Minneapolis*, 211 F.3d 1097, 1105 (8th Cir. 2000); *see also* *Smith v. St. Louis University*, 109 F.3d 1261, 1266 (8th Cir. 1997) ("Passage of time between events does not by itself foreclose a claim of retaliation"). The proximity between the plaintiff's protected activity and the employer's adverse employment action often is a strong circumstantial factor. *Smith*, 109 F.3d at 1266; *Bassett*, 211 F.3d at 1105. In *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273 (2001), the Supreme Court noted: "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient

evidence of casualty to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'"

Standard for Causation

~~[~~Under Title VII, as amended by the Civil Rights Act of 1991, the standard for causation to establish liability for *discrimination* is whether discriminatory intent was ~~"~~a "motivating factor" in the employer's decision. 42 U.S.C. § 2000e-2(m); *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 2003 WL 21310219 (U.S. June 9, 2003); see also *Pedigo v. P.A.M. Transp. Inc.*, 60 F.3d 1300 (8th Cir. 1995) (applying "motivating factor" causation standard in ADA case). ~~In~~ However, as the court noted in ~~(~~*Norbeck v. Basin Elec. Power Co-op*, 215 F.3d 848, 852 (8th Cir. 2000)~~,~~ (a case under the False Claims Act), ~~the court noted that~~ the Civil Rights Act of 1991 established a "motivating factor" standard for liability in the Title VII discrimination cases, but it did not modify the then-existing standard for liability in Title VII retaliation cases. ~~[CITE TO BE ADDED].~~ Accordingly, even ~~under~~ in a Title VII retaliation case, the standard for liability may require that retaliation was a "determining factor" in the employer's challenged decision. ~~[CITE TO BE ADDED]. The~~ Nevertheless, as suggested by the Eighth Circuit's opinion in *Warren v. Prejean*, 301 F.3d 893, 900-01 (8th Cir. 2002), it appears that the "motivating factor/same decision" format applies in Title VII retaliation cases. With respect to retaliation cases under other statutes such as the ADEA, the Committee believes that the "determining factor" standard should be used unless and until the case law indicates otherwise or, in the alternative, the district court may use the special interrogatories at 5.92 to obtain findings to both standards. Neither the Supreme Court nor the Eighth Circuit has ~~not~~ ruled on this issue as of the publication date for these instructions.

Remedies and Verdict Forms

Lawyers and judges should utilize the damages instructions and verdict forms which apply to the type of discrimination in question. In other words, in a Title VII retaliation case (and subject to the causation standard issue discussed above), the court should use Model Instruction 5.01A et seq.; in an ADEA retaliation case, the court should use Model Instructions 5.11 et seq.; and so on.

The following ~~illustration is~~ instructions are patterned on a situation where the plaintiff claims retaliation based on his or her opposition to alleged race discrimination ~~or racial harassment~~.

5.61 Retaliation for Participation in Proceedings Under Employment Statutes

Your verdict must be for the plaintiff and against the defendant on the plaintiff's retaliation claim if all the following elements have been proved by the [(greater weight) or (preponderance)][1] of the evidence:

First, plaintiff [filed an EEOC charge alleging (race discrimination)][2] and

Second, defendant (discharged)[3] plaintiff; and

Third, plaintiff's [filing of an EEOC charge] [was a ~~[~~(motivating) ~~or (determining)]~~ factor][4] [played a part][5] in defendant's decision to (discharge) plaintiff.

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim. In addition, your verdict must be for the defendant if ~~defendant~~ it has been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have (discharged) plaintiff even if plaintiff had not (filed an EEOC charge). [You may find that plaintiff's [filing of an EEOC charge] [was a motivating factor] [played a part] in defendant's (decision)[6] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [7]

Notes on Use

1. Select the bracketed language which corresponds to the Burden of Proof instruction.

2. Select the appropriate terms depending upon whether plaintiff's underlying complaint involved discrimination based on race, gender, age, disability, etc.

3. Select the appropriate term depending upon whether the alleged retaliatory action involved discharge, demotion, failure to promote, etc.

4. ~~See Committee Introductory Comments in Section 5.60 regarding applicability of the motivating factor/same decision format.~~ This instruction assumes retaliation under Title VIII (race, creed, color, sex, etc.). If retaliation is based on something else, *see* Introductory Comments in Section 5.60.

5. *See* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

6. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

7. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

5.62 Retaliation for Opposition to Harassment or Discrimination

Your verdict must be for the plaintiff and against the defendant on the plaintiff's retaliation claim if all the following elements have been proved by the [(greater weight) or (preponderance)][1] of the evidence:

First, plaintiff complained to defendant that [(he/she) or (name of third party)] [2] was being (harassed/discriminated against) [3] on the basis of (race)~~[2]~~[4]; and

[*Second*, plaintiff reasonably believed that [(he) (she) (name of third party)]~~[3]~~ was being (harassed/discriminated against) on the basis of (race)];~~[3]~~[5] and

[*Second, Third*], defendant (discharged)~~[4]~~[6] plaintiff; and

[*Third, Fourth*], plaintiff's ~~[~~complaint of (racial harassment) (race discrimination)~~]~~ [was a ~~[~~(motivating) ~~or (determining)]~~[5]-factor][7] [played a part][8] in defendant's decision to (discharge) plaintiff.

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim. In addition, your verdict must be for the defendant if ~~defendant~~ it has been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have (discharged) plaintiff even if plaintiff had not (complained about race harassment/discrimination). [You may find that plaintiff's [filing of an EEOC charge] [was a motivating factor] [played a part] in defendant's (decision)[9] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [10]

Notes on Use

1. Select the bracketed language which corresponds to the Burden of Proof instruction.

2. Select the appropriate term depending upon whether the plaintiff complained about discrimination toward himself/herself or toward a third party.

~~2~~ 3. Select the appropriate term depending on whether plaintiff's underlying complaint involved harassment or allegedly discriminatory employment decision~~, and~~ whether the underlying complaint was based on race, gender, age, disability, etc.

4. Select the appropriate term depending upon whether the underlying complaint was based on race, gender, age, disability, etc.

~~3~~ 5. Plaintiff does not need to prove that the underlying employment practice by the employer was, in fact, unlawful. Instead, employees are protected if they opposed an employment practice which they reasonably and in good faith believe to be unlawful. Only submit this paragraph if there is evidence to support a factual dispute as to whether plaintiff was complaining of or opposing discrimination in good faith. (See Committee Comments, below).

~~4~~ 6. Select the appropriate term depending upon whether the allegedly retaliatory action involved discharge, demotion, failure to promote, etc.

~~5~~ 7. *See* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

8. ~~See Committee Introductory Comments in Section 5.60 regarding applicability of the motivating factor/same decision format.~~ This instruction assumes retaliation under Title VIII (race, creed, color, sex, etc.). If retaliation is based on something else, *see* Introductory Comments in Section 5.60.

9. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

10. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

~~**Committee Comments**~~

5.70 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION

Introductory Comment

The legal theory underlying First Amendment retaliation cases is that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983); *see also Pickering v. Board of Educ.*, 391 U.S. 563, 568-74 (1968); *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987); *Waters v. Churchill*, 511 U.S. 661 (1994). Although most First Amendment retaliation cases relate to the termination of the plaintiff's employment, they can involve demotions, suspensions, and other employment-related actions. *See, e.g., Stever v. Independent School Dist. No. 625*, 943 F.2d 845 (8th Cir. 1991) (transfer); *Powell v. Basham*, 921 F.2d 165, 167-68 (8th Cir. 1990) (denial of promotion); *Duckworth v. Ford*, 995 F.2d 858, 860-61 (8th Cir. 1993) (harassment). Generally, there are three issues in First Amendment retaliation cases: whether the plaintiff's speech was "protected activity" under the First Amendment; whether the plaintiff's speech was a motivating or substantial factor in the defendant's decision to terminate or otherwise impair the plaintiff's employment; and whether the defendant would have taken the same action irrespective of the plaintiff's speech. *E.g., Hamer v. Brown*, 831 F.2d 1398, 1401 (8th Cir. 1987); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 313 (8th Cir. 1986). In view of the Supreme Court's decision in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), the model instruction on liability utilizes a motivating-factor/same-decision burden-shifting format in all First Amendment retaliation cases.

5.71 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - ESSENTIAL ELEMENTS

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's First Amendment retaliation claim][2] if the following elements have been proved by the [(greater weight) (preponderance)][3] of the evidence:

First, defendant [discharged][4] plaintiff; and

Second, plaintiff's [here specifically describe plaintiff's protected speech - *e.g.*, letter to the local newspaper][5] [was a motivating factor][6] [played a part][7]in defendant's decision [to discharge][~~7~~8] plaintiff[; and

Third, defendant was acting under color of law].[~~8~~9]

However, your verdict must be for defendant if any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, or if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant would have [discharged] plaintiff regardless of [his/her] (letter to the local newspaper).[~~9~~10] [You may find that plaintiff's [filing of an EEOC charge] [was a motivating factor] [played a part] in defendant's (decision)[11] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [12]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

4. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

5. To avoid difficult questions regarding causation, it is very important to specifically describe the speech which forms the basis for the claim. Vague references to "the plaintiff's speech" or "the plaintiff's statements to the school board" often will be inadequate; instead, specific reference to the

time, place and substance of the speech (*e.g.*, "plaintiff's comments criticizing teacher salaries at the April 1992 school board meeting") is recommended. Whenever there is a genuine issue as to whether the plaintiff's speech was "protected" by the First Amendment, the trial court should be extremely careful in making the record regarding this issue. If the trial court can readily determine that the plaintiff's speech was "protected" by the First Amendment without resort to jury findings, a succinct description of the protected speech should be inserted in the elements instruction. By way of example, the model instruction makes reference to plaintiff's "letter to the local newspaper." However, if there is an underlying factual dispute impacting whether the plaintiff's speech was protected, any questions of fact should be submitted to the jury through special interrogatories or other special instructional devices. *See Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002); *Shands v. City of Kennett*, 993 F.2d 1337, 1342-43 (8th Cir. 1993).

As suggested by *Shands v. City of Kennett*, 993 F.2d 1337, 1342-43 (8th Cir. 1993), the trial court may separately submit special interrogatories to elicit jury findings as to the relevant balancing factors, while reserving judgment on the legal impact of those findings. For a sample set of interrogatories, *see infra* Model Instruction 5.71A. The use of special interrogatories on these model instructions was approved in *Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002). If the trial court takes this approach, it should postpone its entry of judgment while it fully evaluates the implications of the jury's findings of fact. *See infra* Model Instruction 5.75A. Alternatively, if the essential jury issue can be crystallized in the form of a single essential element which the plaintiff must prove, it may be included in the elements instruction. For example, in *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983), the trial court instructed the jury that its verdict had to be for the defendants if it believed that the plaintiff's "exercise of free speech had a disruptive impact upon the [school district's] employees."

6. The Committee believes that the term "motivating factor" ~~may be of such common usage that it need not~~ should be defined. See Instruction 5.96, *infra*. ~~If the jury has a question regarding this term, the following may be a suitable definition: "The term 'motivating factor' means a consideration that moved the defendant toward its decision." The phrase "a factor that played a part" also may be an appropriate substitute for the phrase "motivating factor." *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101-02 (8th Cir. 1988). *But cf. Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977) (equating "motivating factor" with "substantial factor").~~

7. *See* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

8. The bracketed term should be consistent with the first element. Accordingly, this instruction must be modified in a "failure-to-hire," "failure-to-promote," or "demotion" case.

~~8~~ 9. Use this language if the issue of whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction.

~~9~~ 10. If appropriate, this instruction may be modified to include a "business judgment" and/or a "pretext" instruction. *See infra* Model Instructions 5.94, 5.95.

11. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

12. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

OVERVIEW

Public employers may not retaliate against their employees for speaking out on matters of public concern unless their speech contains knowingly or recklessly false statements, undermines the ability of the employee to function, or interferes with the operation of the governmental entity. *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983); ~~. In recent years, the Eighth Circuit has issued a number of noteworthy decisions concerning this theory of liability.~~ *S see also Duckworth v. Ford*, 995 F.2d 858, 861 (8th Cir. 1993) (holding that defendants were not entitled to qualified immunity in First Amendment case); *Shands v. City of Kennett*, 993 F.2d 1337, 1344-46 (8th Cir. 1993) (affirming j.n.o.v. for employer where plaintiff's comments regarding personnel and safety issues were not protected by First Amendment); *Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197 (8th Cir. 1993) (affirming summary judgment for employer where plaintiff's comments regarding school district policy were not "protected activity"); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992) (individual defendant was not entitled to qualified immunity defense in First Amendment case); *Bartlett v. Fischer*, 972 F.2d 911 (8th Cir. 1992) (approving qualified immunity defense in First Amendment case); *Stever v. Independent School Dist. No. 625*, 943 F.2d 845 (8th Cir. 1991) (analyzing "protected speech" and "causation" issues); *Powell v. Basham*, 921 F.2d 165 (8th Cir. 1990) (holding that public employee's criticism of employer's promotion process was "protected activity"); *Crain v. Board of Police Comm'rs*, 920 F.2d 1402 (8th Cir. 1990) (affirming summary judgment where plaintiffs' internal grievances did not rise to the level of "protected speech"); *Hoffmann v. Mayor of City of Liberty*, 905 F.2d 229 (8th Cir. 1990) (employee grievance was not protected by the First Amendment); *Darnell v. Ford*, 903 F.2d 556 (8th Cir. 1990) (ruling that state police officer's support of a certain candidate for the position of Highway Patrol Superintendent was "protected activity").

PRIMARY ISSUES IN FIRST AMENDMENT CASES

Generally, there are three primary issues in First Amendment retaliation cases: (1) whether the plaintiff's speech was "protected activity" under the First Amendment; (2) whether the plaintiff's protected activity was a substantial or motivating factor in defendant's decision to terminate or otherwise impair the plaintiff's employment; and (3) whether the defendant would have taken the same action irrespective of plaintiff's protected activity. *Hamer v. Brown*, 831 F.2d 1398, 1401 (8th Cir. 1987); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 313 (8th Cir. 1986); *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 672 (8th Cir. 1986). The determination of whether the plaintiff's speech was "protected" presents a question of law for the court. *E.g., Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197, 1198 (8th Cir. 1993); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 313 (8th Cir. 1986).

SECONDARY ISSUES RELATING TO "PROTECTED SPEECH" DETERMINATION

In general, the question of whether the plaintiff's speech was "protected" depends upon two subissues: (1) whether the plaintiff's speech addressed a matter of "public concern"; and (2) whether, in balancing the competing interests, the plaintiff's interest in commenting on matters of public concern outweighs the government's interest in rendering efficient services to its constituents. *Waters v. Churchill*, 511 U.S. 661 (1994); *Hamer v. Brown*, 831 F.2d 1398, 1401-02 (8th Cir. 1987); *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 672 (8th Cir. 1986). In many cases, the trial court will be able to determine whether the plaintiff's speech was protected without much difficulty. However, as discussed below, complicated issues can arise when there are factual disputes underlying this issue. *See Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993).

a. *Public Concern*

Analysis of whether the plaintiff's speech addressed a matter of "public concern" requires consideration of the plaintiff's role in conveying the speech, whether the plaintiff attempted to communicate to the public at large, and whether the plaintiff was attempting to generate public debate or merely pursuing personal gain. *Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197 (8th Cir. 1993); *but cf. Derrickson v. Board of Educ.*, 703 F.2d 309, 316 (8th Cir. 1983) (speech can be protected even if it was "privately express[ed]" to plaintiff's superiors); *Darnell v. Ford*, 903 F.2d 556, 563 (8th Cir. 1990) (speech was protected even if it was motivated by plaintiff's self-interest); *see generally Connick v. Myers*, 461 U.S. 138, 147 (1983) (speech is not protected by First Amendment if plaintiff speaks merely as an employee upon matters only of personal interest). Determination of whether the plaintiff's speech addressed a matter of public concern appears to fall exclusively within the province of the court. *See Lewis v. Harrison School Dist.*, 805 F.2d 310, 312-13 (8th Cir. 1986) (trial court erred in following jury's finding that plaintiff's speech did not address a matter of public concern).

b. *Balancing of Interests*

Analysis of the "balancing" issue depends upon a variety of factors, which traditionally have included the following: the need for harmony in the workplace; whether the governmental entity's mission required a close working relationship between the plaintiff and his or her co-workers when the speech in question has caused or could have caused deterioration in the plaintiff's work relationships; the time, place, and manner of the speech; the context in which the dispute arose; the degree of public interest in the speech; and whether the speech impaired the plaintiff's ability to perform his or her duties. *Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993); *Hamer v. Brown*, 831 F.2d 1398, 1402 (8th Cir. 1987); *see generally Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). This balancing process is flexible, and the weight to be given to any one factor depends upon the specific circumstances of each case. *Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993).

c. *Balancing and Jury Instructions*

Although the balancing process ultimately is a function for the court, Eighth Circuit case law indicates that subsidiary factual issues must be submitted to the jury. For example, in *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983), the court stated that "[i]t was for the jury to decide whether the [plaintiff's] letter [to the editor] created disharmony between McGee and his immediate supervisors." Likewise, in *Lewis v. Harrison School Dist.*, 805 F.2d 310, 315 (8th Cir. 1986), the Eighth Circuit ruled that it was error for the trial court to disregard the jury's special interrogatory findings on certain balancing issues. In *Shands v. City of Kennett*, 993 F.2d 1337 (8th Cir. 1993), the court stated that:

> Any underlying factual disputes concerning whether the plaintiff's speech is protected . . . should be submitted to the jury through special interrogatories or special verdict forms. For example, the jury should decide factual questions such as the nature and substance of the plaintiff's speech activity, and whether the speech created disharmony in the work place. The trial court should then combine the jury's factual findings with its legal conclusions in determining whether the plaintiff's speech is protected.

Id. at 1342-43 (citations omitted). Accordingly, this model instruction may be supplemented with a set of special interrogatories or it may require modification to elicit specific jury findings on critical balancing issues such as "disharmony." *See infra* Note on Use 2; Model Instruction 5.71A. The use of these special interrogatories was approved in *Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002). Although the plaintiff appears to have the burden of proof as to whether the speech was "constitutionally protected," *see Cox v. Miller County R-1 School Dist.*, 951 F.2d 927, 931 (8th Cir. 1991) and *Stever v. Independent School Dist. No. 625*, 943 F.2d 845, 849-50 (8th Cir. 1991), it is unclear whether the plaintiff bears the burden of proof as to each subsidiary factor.

When the trial court submits special interrogatories to the jury, it bears emphasis that the ultimate decision as to whether the plaintiff's speech was protected is a question of law for the court. *E.g., Lewis v. Harrison School Dist.*, 805 F.2d 310, 312-13 (8th Cir. 1986) (trial court erred in following jury's finding that speech did not address matter of public concern); *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640, 644-45 (8th Cir. 1983) (plaintiff's speech was protected even though it "contributed to the turmoil" at the workplace). It also bears emphasis that the defendant's reasonable perception of the critical events is controlling; the jury cannot be allowed to substitute its judgment as to what "really happened" for the honest and reasonable belief of the defendant. *Waters v. Churchill*, 511 U.S. 661 (1994.)

d. *Balancing and Qualified Immunity*

The need to address the balancing issue in jury instructions is most likely to arise in cases brought against municipalities, school districts, and other local governmental bodies which are not entitled to qualified immunity or Eleventh Amendment immunity. In contrast, ~~recent~~ Eighth Circuit case law suggests that *individual defendants* may have qualified immunity with respect to any jury-triable damages claims if the "balancing issue" becomes critical in a First Amendment case. *See Grantham v. Trickey*, 21 F.3d 289, 295 (8th Cir. 1994) (holding that individual defendants are entitled to qualified immunity where there is specific and unrefuted evidence that the employee's speech affected morale and substantially disrupted the work environment); *Bartlett v. Fisher*, 972 F.2d 911, 916 (8th Cir. 1992) (suggesting that qualified immunity from damages will apply whenever a First Amendment retaliation case involves the "balancing test"). *But cf. Duckworth v. Ford*, 995 F.2d 858, 861 (8th Cir. 1993) (rejecting individual defendants' qualified immunity defense in First Amendment case); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992) (rejecting qualified immunity in First Amendment case where defendant failed to introduce evidence sufficient to invoke the balance test); *Powell v. Basham*, 921 F.2d 165, 167-68 (8th Cir. 1990) (rejecting qualified immunity defense in First Amendment wrongful discharge cases); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 318 (8th Cir. 1986) (same). In *Waters v. Churchill*, 511 U.S. 661 (1994), the Supreme Court declined to address the issue of qualified immunity in First Amendment cases. In addition, state governmental bodies typically have Eleventh Amendment immunity from damages claims. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). Accordingly, when balancing issues arise in a case brought by a state employee, the defendants may have immunity from a claim for damages and, as a result, there would be no need for a jury trial or jury instructions.

MOTIVATION AND CAUSATION

If a plaintiff can make the required threshold showing that he or she engaged in protected activity, the remaining issues focus on the questions of motivation and causation: was the plaintiff's employment terminated or otherwise impaired because of his or her protected activity? In *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977), the Supreme Court introduced the "motivating-factor"/"same-decision" burden shifting format in First Amendment retaliation cases. On

the issue of causation, it also should be noted that the Eighth Circuit has allowed a claim against a defendant who recommended the plaintiff's dismissal but lacked final decision-making authority. *Darnell v. Ford*, 903 F.2d 556, 561-62 (8th Cir. 1990). The Eighth Circuit also has allowed a claim against a school board for unknowingly carrying out a school principal's retaliatory recommendation. *Cox v. Dardanelle Pub. School Dist.*, 790 F.2d 668, 676 (8th Cir. 1986). ~~More recently, i~~In *Waters v. Churchill*, 511 U.S. 661 (1994), the Supreme Court ruled that a public employer does not violate the First Amendment if it honestly and reasonably believes reports by coworkers of unprotected conduct by the plaintiff; the Supreme Court did not address the situation where the public employer relied upon the tainted recommendation of a management-level employee.

5.71A 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - SPECIAL INTERROGATORIES REGARDING "PROTECTED SPEECH" BALANCING ISSUES

To assist the Court in determining whether plaintiff's [describe the speech upon which plaintiff's claim is based--*e.g.*, "memo to Principal Jones dated January 24, 1989"][1] was protected by the First Amendment to the United States Constitution, you are directed to consider and answer the following questions:

1. Did plaintiff's [memo to Principal Jones dated January 24, 1989] cause, or could it have caused, disharmony or disruption in the workplace?[2]

2. Did plaintiff's [January 24, 1989, memo to Principal Jones] impair [his/her] ability to perform [his/her] duties?[3]

Please use the Supplemental Verdict Form to indicate your answers to these questions.[4]

Notes on Use

1. Describe the speech upon which the plaintiff bases his or her claim.

2. The first two factors mentioned in *Shands* relate to "the need for harmony in the office or work place" and "whether the government's responsibilities required a close working relationship to exist between the plaintiff and co-workers." *Shands*, 993 F.2d at 1344. The second factor mentioned in *Shands* addresses whether the plaintiff's speech caused or could have caused deterioration in plaintiff's working relationships. *Shands*, 993 F.2d at 1344. This question is designed to test this issue.

3. Yet another balancing factor mentioned in *Shands* is whether the speech at issue impaired the plaintiff's ability to perform his or her assigned duties. *See Shands*, 993 F.2d at 1344. This question is designed to test this issue. As discussed in the Committee Comments, this list of questions is not required in all cases, nor is it all-inclusive. If other issues exist concerning the context or content of the plaintiff's speech, additional questions should be included.

4. The jury's answers to the special interrogatories should be recorded on a Supplemental Verdict Form. *See infra* Model Instruction 5.75A.

Committee Comments

The Eighth Circuit has indicated that, whenever the *Pickering* balancing process must be invoked to determine whether the plaintiff's speech was protected by the First Amendment, "[a]ny underlying factual disputes . . . should be submitted to the jury through special interrogatories or special

verdict forms." *Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993). This instruction is designed to meet the mandate of *Shands* and the use of special interrogatories based on these model instructions was approved in *Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002). *See generally* Committee Comments to Model Instruction 5.71, ~~*infra*~~ *supra*. ~~If the plaintiff's speech clearly is "protected" without reference to the *Pickering* balancing analysis, this instruction should not be used.~~

~~Although the *Shands* decision described a number of factors to be utilized in the balancing process, only two seem likely to raise factual issues which warrant the submission of special interrogatories: whether the plaintiff's speech caused, or could have caused, disharmony or disruption in the workplace; and whether the speech impaired the plaintiff's ability to perform his or her job. The other relevant factors--which deal with the "need for harmony in the workplace," the "degree of public interest in the speech," the "context in which the dispute arose," and the "time, manner, and place of the speech"--typically will not present factual issues for the jury. Nevertheless, this instruction should be tailored to the particular situation at hand by adding, deleting, or modifying the relevant questions. If there is an issue concerning the time, place, or manner of the speech, it should be resolved by the jury. For example, if the plaintiff contends that he/she made the crucial remark at a public meeting while the defendant claims the remark was made in a private conversation, the issue should be submitted to the jury by means of a special interrogatory, such as:~~

~~Did the plaintiff make his/her statement [describe the statement - *e.g.*, about corporal punishment of students] at the public school board meeting of May 1, 1992?~~

~~Similarly, i~~If there is a material dispute over the precise content of the plaintiff's speech, it appears that the issue must be resolved by the jury. In resolving any such factual dispute, deference must be given to the honest and reasonable perception of the defendant. *Waters v. Churchill*, 511 U.S. 661 (1994). Thus, if the defendant takes the position that it terminated the plaintiff based on a third-party report that the plaintiff engaged in unprotected insubordination, the following sequence of interrogatories may be appropriate:

1. Did plaintiff say that his/her supervisor was incompetent?

Yes _____ No _____

Note: If your answer is "yes," you should not answer Question No. 2. If your answer is "no," continue on the Question No. 2.

2. Did defendant honestly and reasonably believe the report of [name plaintiff's coworker or other source of third-party report] that plaintiff had referred to his/her supervisor as incompetent?

Yes _____ No _____

In general, it appears that the plaintiff has the burden of showing that his or her speech was constitutionally protected. *See Cox v. Miller County R-1 School Dist.*, 951 F.2d 927, 931 (8th Cir.

1991); *Stever v. Independent School Dist. No. 625*, 943 F.2d 845, 849-50 (8th Cir. 1991). However, it is unclear whether the plaintiff should bear the risk of nonpersuasion on every subsidiary factual issue. Accordingly, this instruction does not include any "burden of proof" language. It also should be noted that the ultimate balancing test rests within the province of the Court and that no particular factor is dispositive. *See Shands*, 993 F.2d at 1344, 1346.

5.72 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - ACTUAL DAMAGES

If you find in favor of plaintiff under Instruction ____,[1] then you must award plaintiff such sum as you find by the [(greater weight) or (preponderance)][2] of the evidence will fairly and justly compensate plaintiff for any actual damages you find plaintiff sustained as a direct result of defendant's conduct as submitted in Instruction _____.[3] Actual damages include any wages or fringe benefits you find plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge], through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by plaintiff during that time.[4] Actual damages also may include [list damages supported by the evidence].[5]

[You are also instructed that plaintiff has a duty under the law to "mitigate" his damages--that is, to exercise reasonable diligence under the circumstances to minimize his damages. Therefore, if you find by the [(greater weight) or (preponderance)] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to him, you must reduce his damages by the amount he reasonably could have avoided if he had sought out or taken advantage of such an opportunity.][6] [Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][7]

Notes on Use

1. Insert the number or title of the "essential element" instruction here.

2. Select the bracketed language which corresponds to the burden-of-proof instruction given.

3. When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th Cir. 1981); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the

amount the employer would have paid as premiums on the employee's behalf. *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

4. This sentence should be used to guide the jury in calculating the plaintiff's economic damages. In section 1983 cases, however, a prevailing plaintiff may recover actual damages for emotional distress and other personal injuries. *See Carey v. Piphus*, 435 U.S. 247 (1978). The words following "*minus*" are accurate only to the extent that they refer to employment that has been taken in lieu of the employment with the defendant. That is significant where, for example, the plaintiff had a part-time job with someone other than the defendant *before* the discharge and retained it after the discharge. In that circumstance, the amount of earnings and benefits from that part-time employment received after the discharge should not be deducted from the wages or fringe benefits the plaintiff would have earned with the defendant if he or she had not have been discharged, unless the part-time job was enlarged after the discharge. In such a case, the instruction should be modified to make it clear to the jury which income may be used to reduce plaintiff's recovery.

5. In section 1983 cases, a prevailing plaintiff may recover damages for mental anguish and other personal injuries. The specific elements of damages that may be set forth in this instruction are similar to those found in the Civil Rights Act of 1991. *See* 42 U.S.C. § 1981a(b)(3). *See ~~infra~~ supra* Model Instructions 5.02 n.8, and 4.51.

6. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

7. This paragraph may be given at the trial court's discretion.

Committee Comments

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982). Moreover, because section 1983 damages are not limited to back pay, the instruction also permits the recovery of general damages for pain, suffering, humiliation, and the like.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy “in lieu of” reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury’s determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Industries*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same) *but cf. Blum v Witco Chemical Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction which submits this issue in more direct terms.

5.73 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - NOMINAL DAMAGES

If you find in favor of plaintiff under Instruction ____,[1] but you do not find that plaintiff's damages have ~~no~~ monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar ($1.00).[2]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. One Dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

Committee Comments

Most employment discrimination cases involve lost wages and benefits. Nevertheless, a nominal damage instruction should be given in appropriate cases, such as where a plaintiff claiming a discriminatory harassment did not sustain any loss of earnings. *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 542-43, 548 (8th Cir. 1984).

An award of nominal damages can support a punitive damage award. *See Goodwin v. Circuit Court of St. Louis County*, 729 F.2d at 548.

If nominal damages are submitted, the verdict form must contain a line where the jury can make that finding.

5.74 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - PUNITIVE DAMAGES

In addition to actual damages, the law permits the jury under certain circumstances to award the injured person punitive damages in order to punish the defendant[1] for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

If you find in favor of plaintiff and against defendant (name), [and if you find by the [(greater weight) or (preponderance)][2] of the evidence that plaintiff's firing was motivated by evil motive or intent, or that defendant was callously indifferent to plaintiff's rights],[3] then in addition to any damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or to deter defendant and others from like conduct in the future. Whether to award plaintiff punitive damages, and the amount of those damages are within your discretion.

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed such defendants may be the same or they may be different.][4]

Notes on Use

1. Public entities, such as cities, cannot be sued for punitive damages under section 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Consequently, the target of a punitive damage claim must be an individual defendant, sued in his/her individual capacity.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. *See ~~infra~~ supra* Model Instruction 5.24 n.2.

4. The bracketed language is available for use if punitive damage claims are submitted against more than one defendant.

Committee Comments

Punitive damages are recoverable under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30 (1983). The Committee is considering whether this instruction should be revised in light of *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996).

5.75 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - VERDICT FORM

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On the [First Amendment retaliation][1] claim of plaintiff [John Doe], as submitted in Instruction _____,[2] we find in favor of

_____

(Plaintiff John Doe) or (Defendant Sam Smith)

Note: Complete the following paragraphs only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's (name) damages as defined in Instruction _____[3] to be:

$_____ (stating the amount or, if none, write the word "none")[4] (stating the amount, or if you find that plaintiff's damages have no monetary value, set forth a nominal amount such as $1.00).[5]

We assess punitive damages against defendant (name), as submitted in Instruction _____,[6] as follows:

$_____ (stating the amount or, if none, write the word "none").

_____

Foreperson

Date: _____

Notes on Use

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

2. The number or title of the "essential elements" instruction should be inserted here.

3. The number or title of the "actual damages" instruction should be inserted here.

4. Use this phrase if the jury has not been instructed on nominal damages.

5. Use this phrase if the jury is instructed on nominal damages.

6. The number or title of the "punitive damages" instruction should be inserted here.

~~**Committee Comments**~~

~~*See infra* Model Instruction No. 5.35.~~

5.75A 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - SPECIAL INTERROGATORIES ON "BALANCING" ISSUES

SUPPLEMENTAL VERDICT FORM

As directed in Instruction No. _____,[1] we find as follows:

Question No. 1: Did plaintiff's [memo to Principal Jones][2] cause, or could it have caused, disharmony or disruption in the workplace?

____ Yes ____ No
(Mark an "X" in the appropriate space)

Question No. 2: Did plaintiff's [memo to Principal Jones] impair [his/her] ability to perform [his/her] duties?

____ Yes ____ No
(Mark an "X" in the appropriate space)

_____
Foreperson

Date: _____

Notes on Use

1. The number or title of the special interrogatory instruction should be inserted here. *See ~~infra~~ supra* Model Instruction 5.71A.

2. Describe the speech upon which the plaintiff bases his or her claim. This description should be identical to the phrase used in the special interrogatory instruction. *See ~~infra~~ supra* Model Instruction 5.71A.

Committee Comments

See Committee Comments to Instruction No. 5.71A. These special interrogatories are available for use when there are factual disputes underlying the determination of whether or not the plaintiff's speech was protected by the First Amendment. This supplemental verdict form should never be used alone; it always should accompany Model Instructions 5.71, 5.71A and 5.75, *~~infra~~ supra*.

Employment Cases ~~-- Element and Damage Instructions~~

The questions listed in this model instruction are for illustration only; in every case, the list of relevant questions must be tailored to the particular situation. It also bears emphasis that the ultimate question of whether the plaintiff's speech was protected is for the Court and that no single factor is dispositive. Accordingly, when this supplemental verdict form is used, the trial court should receive all of the jury's findings and it should postpone its entry of judgment while it fully evaluates the implications of those findings.

5.80 CASES UNDER THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

Introduction

These instructions are for use with cases brought under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 - 2654. The purposes of the FMLA are to balance the demands on the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. 29 U.S.C. § 2601(b). The Act entitles eligible employees to take up to 12 workweeks of unpaid leave because of a serious health condition that makes the employee unable to perform the functions of his or her position; because of the birth of a son or daughter and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; or to care for the employee's spouse, son, daughter, or parent who has a serious health condition. 29 U.S.C. § 2612, 29 C.F.R. § 825.112.

Employers Covered by the FMLA

A covered employer under the Act is one engaged in commerce or in an industry affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A); 29 C.F.R. § 825.104(d); *Beal v. Rubbermaid Commercial Products, Inc*., 972 F. Supp. 1216, 1222 n.13 (S.D. Iowa 1997), *aff'd*, 149 F.3d 1186 (8th Cir. 1998). The Eighth Circuit has also held that public officials in their individual capacities are "employers" under the FMLA. *Darby v. Bratch*, 287 F.3d 673, 680-81 (8th Cir. 2002). In addition, the Supreme Court has held that states are employers under the FMLA. Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721 (2003).

Employees Eligible for Leave

Not all employees are entitled to leave under FMLA. Before an employee can take leave to care for himself or herself, or a family member, the following eligibility requirements must be met: he or she must have been employed by the employer for at least 12 months and must have worked at least 1,250 hours during the previous 12-month period. 29 U.S.C. § 2611(2)(A). A husband and wife who are both eligible for FMLA leave and are employed by the same covered employer may be limited by the employer to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for 1) the birth of the employee's son or daughter or to care for that newborn; 2) for placement of a son or daughter for adoption or foster care, or to care for the child after placement; or 3) or to care for the employee's parent. 29 C.F.R. § 825.202(a).

Family Members Contemplated by the FMLA

Employees are also eligible for leave when certain family members – his or her spouse, son, daughter, or parent – have serious health conditions. Spouse means a husband or wife as defined or recognized under state law where the employee resides, including common law spouses in states where common law marriages are recognized. 29 U.S.C. 2611(13); 29 C.F.R. § 825.113.

Under the FMLA, a son or daughter means a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or who is age 18 or older but is incapable of self-care because of a mental or physical disability. 29 U.S.C. § 2611(12); 29 C.F.R. § 825.113(c). Persons with "*in loco parentis*" status under the FMLA include those who had day-to-day responsibility to care for and financially support the employee when the employee was a child. 29 C.F.R. § 825.113(c)(3).

Parent means a biological parent or an individual who stands or stood *in loco parentis* to an employee when the employee was a son or daughter. 29 U.S.C. § 2611(7). The term "parent" does not include grandparents or parents-in-law unless a grandparent or parent-in-law meets the *in loco parentis* definition. *Krohn v. Forsting*, 11 F. Supp.2d 1082, 1091 (E.D. Mo. 1998); 29 C.F.R. § 825.113(b).

"Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. 29 C.F.R. § 825.113(c)(1).

"Activities of daily living" include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. *Id.* "Instrumental activities of daily living" include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. *Id.* "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. 29 C.F.R. § 825.113(c)(2). These terms are defined in the same manner as they are under the Americans with Disabilities Act. *Id.*

~~Parent means a biological parent or an individual who stands or stood *in loco parentis* to an employee when the employee was a son or daughter. 29 U.S.C. § 2611(7). The term "parent" does not include grandparents or parents-in-law unless a grandparent or parent-in-law meets the *in loco parentis* definition. *Krohn v. Forsting*, 11 F. Supp.2d 1082, 1091 (E.D. Mo. 1998); 29 C.F.R. § 825.113(b).~~

Leave for Birth, Adoption or Foster Care

The FMLA permits an employee to take leave for the birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement. 29 U.S.C. § 2612(a); 29 C.F.R. § 825.100.

The right to take leave under the FMLA applies equally to male and female employees. A father as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child. 29 C.F.R. § 825.112(b). Circumstances may require that the FMLA leave begin before the actual date of the birth of a child or the actual placement for adoption of a child. For example, an expectant mother may need to be absent from work for prenatal care, or her condition may make her

unable to work. In addition, if an absence from work is required for the placement for adoption or foster care to proceed, the employee is entitled to FMLA leave. 29 C.F.R. § 825.112(c)-(d).

An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement unless state law allows, or the employer permits, leave to be taken for a longer period. 29 C.F.R. § 825.201. Any such FMLA leave must be concluded during this one-year period. *Id.* An employee is not required to designate whether the leave the employee is taking is FMLA leave or leave under state law. 29 C.F.R. § 825.701. If an employee's leave qualifies for FMLA and state-law leave, the leave used counts against the employee's entitlement under both laws. *Id.*

What Constitutes a "Serious Health Condition?"

One of the more frequently litigated aspects of the FMLA is the issue of what type of condition constitutes a "serious health condition" under the Act. The concept of "serious health condition" was meant to be construed broadly, so that the FMLA's provisions are interpreted to effect the Act's remedial purpose. *Stekloff v. St. John's Mercy Health Systems*, 218 F.3d 858, 862 (8th Cir. 2000). The phrase is defined in the regulations as an illness, injury, impairment or physical or mental condition that involves inpatient care, a period of incapacity combined with treatment by a health care provider, pregnancy or prenatal care, chronic conditions, long-term incapacitating conditions, and conditions requiring multiple treatments. 29 C.F.R. § 825.114(a).

Specifically, inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities), or any subsequent treatment in connection with the inpatient care. 29 C.F.R. § 825.114(a)(1).

Incapacity plus treatment means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive days, including any subsequent treatment or period of incapacity relating to the same condition, that <u>also</u> involves: 1) treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health services (for example, a physical therapist) under orders of, or on referral by, a health care provider; or 2) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider. 29 C.F.R. § 825.114(a)(2)(i). In some circumstances, the regulatory definition of incapacity offers limited guidance. *See, e.g., Caldwell v. Holland of Texas*, 208 F.3d 671, 675 (8th Cir. 2000) (in situation where three-year-old child did not work or attend school, the FMLA regulations offered insufficient guidance for determining whether child was incapacitated and fact finder must determinate whether the child's illness demonstrably affected his normal activity).

Note that under the FMLA, a demonstration that an employee is unable to work in his or her current job due to a serious health condition is enough to show the employee is incapacitated even if

that job is the only one the employee is unable to perform. *Stekloff*, 218 F.3d at 861. This standard is less stringent than under the ADA in which a plaintiff must show that he or she is unable to work in a broad range of jobs to show that he or she is unable to perform the major life activity of working. *Id.*

Pregnancy or prenatal care includes any period of incapacity due to the pregnancy or prenatal care, such as time off from work for doctors' visits. 29 C.F.R. § 825.114(a)(2)(ii).

A chronic health condition means a condition which requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider, which continues over an extended period of time (including recurring episodes of a single underlying condition), and may cause episodes of incapacity (inability to work, attend school or perform other regular daily activities) rather than continuing incapacity. 29 C.F.R. § 825.114(a)(2)(iii).

Long-term incapacitating conditions are those for which treatment may not be effective, but require continuing supervision of a health care provider, even though the patient may not be receiving active treatment. 29 C.F.R. § 825.114(a)(2)(iv).

Conditions requiring multiple treatments includes any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days in the absence of medical intervention or treatment. 29 C.F.R. § 825.114(a)(2)(v).

The FMLA regulations provide some guidance concerning what is and is not a serious health condition. For example, the following generally do not fall within the definition of a serious health condition: routine physical, eye or dental examinations; treatments for acne or plastic surgery; common ailments such as a cold or the flu, ear aches, upset stomach, minor ulcers, headaches (other than migraines); and treatment for routine dental or orthodontic problems or periodontal disease. 29 C.F.R. § 825.114(b),(c). While the above conditions are not generally considered "serious," the Eighth Circuit has held that some conditions, such as upset stomach or a minor ulcer, could still be "serious health conditions" if they meet the regulatory criteria, for example, an incapacity of more than three consecutive calendar days that also involved qualifying treatment. *Thorson v. Gemini, Inc.*, 205 F.3d 370, 379 (8th Cir. ~~2000~~), *aff'd*, 205 F.3d 370 (8th Cir. 2000).

In addition, the regulations provide guidance regarding what conditions commonly are considered serious health conditions. For example, chronic conditions could include asthma, diabetes or epilepsy; long-term incapacitating conditions could include Alzheimer's, a severe stroke or the terminal stages of a disease; and conditions requiring multiple treatments could include cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis). 29 C.F.R. § 825.114(a).

~~The regulations also provide that the phrase "continuing treatment" as used in the definition of serious health condition, includes a course of prescription medication and therapy, but not over-the-counter medications, bed-rest or exercise. 29 C.F.R. § 825.114(b).~~

Courts in the Eighth Circuit have provided additional guidance regarding what constitutes a serious health condition. In *Beal v. Rubbermaid Commercial Products, Inc.*, 972 F. Supp. 1216 (S.D. Iowa 1997), *aff'd*, 149 F.3d 1186 (8th Cir. 1998) the court analyzed several conditions against the regulatory definition. The court found that a minor back ailment, eczema, and non-incapacitating bronchitis were not serious health conditions under the FMLA. *Id.* at 1223-25. The court also held that an employee was not entitled to FMLA leave subsequent to her son's death noting "[l]eave is not meant to be used for bereavement because a deceased person has no basic medical, nutritional, or psychological needs which need to be cared for." *Id*. at 1216.

In addition, the Eighth Circuit has held that exams and evaluations given to an employee's child to determine whether the child had been sexually molested did not amount to treatment for a serious health condition covered by the FMLA. *Martyszenko v. Safeway, Inc*., 120 F.3d 120, 123-24 (8th Cir. 1997). The alleged molestation did not create a mental condition that hindered the child's ability to participate in any activity at all and did not restrict any of the child's daily activities. *Id.*

The regulations also provide that the phrase "continuing treatment" as used in the definition of serious health condition, includes a course of prescription medication and therapy, but not over-the-counter medications, bed-rest or exercise. 29 C.F.R. § 825.114(b).

The Relationship Between the Fair Labor Standards Act (FLSA), Civil Rights Legislation, and the FMLA

Although earlier cases suggested the FMLA was more akin to the FLSA than to Civil Rights legislation, see, e.g.., Morris v. VCW, Inc., 1996 WL 740544 (W.D. Mo. 1996), the Supreme Court has left no doubt that the FMLA is an anti-discrimination statute. Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, ___, 2003 WL 21210426, *4 (U.S. May 27, 2003) ("the FMLA aims to protect the right to be free from gender-based discrimination in the workplace and such a statutory scheme is subject to heightened scrutiny"). However, the FLSA can provide guidance for the interpretation of FMLA terms such as using FLSA "hours of service" to calculate FMLA eligibility for leave and determination of whether a supervisor is an "employer" for FMLA purposes. See Morris at *2 and cases cited therein.

Under the FLSA, the phrases "motivating factor" or "immediate cause" are used to determine whether an employer violated the anti-retaliation provision of the FLSA. These phrases have been interpreted to be the equivalent of a "but for" analysis, that is, discharge is unlawful only if it would not have occurred but for the retaliatory intent, even if it was not the sole reason for the employers' action. McKenzie v. Renberg's, Inc., 94 F.3d 1478 (10th Cir. 1996), cert. denied, 520 U.S. 1186 (1997); Reich v. Davis, 50 F.3d 962, 965 (11th Cir. 1995)." See E.E.O.C. v. HBE Corp., 135 F.3d 543,

555 n.3 (8th Cir. 1998) (plaintiff must prove retaliation was the determining factor, not that it was the only factor).

However, in retaliation cases under the FMLA, courts frequently borrow the framework and method of analysis in civil rights cases. See, e.g., Spurlock v. Peter Bilt Motors Co., Inc., 2003 WL 463491 (6th Cir. (Tenn.)); Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274, 1282-83 (11th Cir. 1999); Chaffin v. John H. Carter Co., Inc., 179 F.3d 316, 319 (5th Cir. 1999); King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999); Hodgens v. Dynamics, 144 F.3d 151 (1st Cir. 1998); Lottinger v. Shell Co., 143 F. Supp. 2d 743 (S.D. Tx. 2001); Maxwell v. GTE Wireless Service Corp., 121 F. Supp. 2d 649, 658 (N.D. Ohio 2000); Bond v. Sterling, Inc., 77 F. Supp. 2d 300, 302 (N.D.N.Y. 1999); Belgrave v. City of New York, 1999 WL 692034 at *42 n.38, aff'd, 216 F.3d 1071 (2000); Stubl v. T.A. Systems, 948 F. Supp. 1075, 1091 (E.D. Mich. 1997); Peters v. Community Action CTE, Inc. of Chem. Chambers-Tallapoosa-Coosa, 977 F. Supp. 1428 (M.D. Alabama 1997). Those cases generally used "motivating factor" where there was direct evidence of discrimination and "determining factor" when there was no direct evidence of discrimination.

A review of the case law suggests that courts look to the FLSA and cases decided thereunder for the definition and scope of "employment-type" terms and concepts in the FMLA. However, the method of analysis for violations of the anti-discrimination provisions of the FMLA suggests looking to civil rights cases. See Hibbs, 538 U.S. at ___, 2003 WL 21210426 at *4. The Eighth Circuit has not clearly resolved this issue. It is also not resolved at this time whether Desert Palace v. Costa's requirement of a motivating factor test for all Title VII cases will carry over to other civil rights cases, including the FMLA. Nothing in the FMLA modifies or affects any federal or state law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability (e.g., Title VII, the Pregnancy Discrimination Act, the Rehabilitation Act, the ADA, etc.) 29 U.S.C. § 2651(a)(b); 29 C.F.R. § 825.702(a).

5.81A FMLA – Wrongful Termination – Essential Elements (employee with a serious health condition)

Your verdict must be for the plaintiff [and against defendant _____][1] if all of the following elements have been proved by [(the greater weight) or (a preponderance)][2] of the evidence:

[*First*, plaintiff was eligible for leave[3]; and]

~~*First*, plaintiff had [specify condition];~~

~~*Second*, [specify condition] was~~ *First*, plaintiff had a serious health condition (as defined in Instruction _____)[4]; and

~~*Third*~~ *Second*, plaintiff was [absent from work][5] because of that serious health condition; and

[~~*Fourth*~~ *Third*, plaintiff gave defendant appropriate notice (as defined in Instruction _____)[6] of [his/her] need to be [absent from work] [5];] [7] and

~~*Fifth*~~ *Fourth*, defendant [describe employment action taken, e.g., discharged]~~[7]~~[8] plaintiff; and

~~*Sixth*~~ *Fifth*, plaintiff's [absence from work][5] was a ~~motivating~~ determining[9] factor in defendant's decision to [describe employment action taken, e.g., discharge]~~[7]~~[8] plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved by [(the greater weight) or (a preponderance)][2] of the evidence, [or if defendant is entitled to a verdict under (Instruction _____)]~~[8]~~ [10].

[You may find that plaintiff's [absence from work] was a ~~motivating~~ determining factor in defendant's (decision)[11] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] ~~not the true reason(s), but [(is) (are)]~~ a pretext to hide discrimination.] [12]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See infra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be

decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "serious health condition."

5. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

6. Insert the number of the Instruction defining "appropriate notice."

7. This element is bracketed because "appropriate notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

~~7~~ 8. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. ~~For example, the FMLA also protects employees who requested but were denied leave from retaliatory termination.~~ Insert the language that corresponds to the facts of the case.

9. See the Introduction for a discussion of whether the term "determining" factor or "motivating" factor should be used.

~~8~~ 10. This language should be used when the defendant is submitting an affirmative defense.

11. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

12. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

The FMLA prohibits an employer from terminating an employee because the employee exercised rights or attempted to exercise rights under the FMLA. An employee who contends he or she was terminated because of FMLA leave, or a request to take FMLA leave, must show that the employer's action was motivated by discrimination because of the leave or request for leave. *Marks v. The School Dist. of Kansas City, Missouri*, 941 F. Supp. 886, 892 (W.D. Mo. 1996) (quoting *Day v. Excel Corp.*, 1996 WL 294341 (D. Kan. 1996)).

If plaintiff is alleging defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95 may be used.

5.81B FMLA – Wrongful Termination – Essential Elements (employee needed to care for spouse, parent, son or daughter with a serious health condition[1])

Your verdict must be for the plaintiff [and against defendant _____][2] if all of the following elements have been proved by [(the greater weight) or (a preponderance)][3] of the evidence:

[*First*, plaintiff was eligible for leave[4]; and]

~~*First*, plaintiff's [identify family member] had [specify condition];~~

~~*Second*, [specify condition] was~~ *First*, plaintiff's [identify family member] had a serious health condition (as defined in Instruction _____)[5]; and

~~*Third*~~ *Second*, plaintiff was needed to care for (as defined in Instruction _____)[6] [identify family member]; and

~~*Fourth*~~ *Third*, plaintiff was [absent from work][7] to care for [identify family member]; and

[~~*Fifth*~~ *Fourth*, plaintiff gave defendant appropriate notice (as defined in Instruction _____)[8] of [his/her] need to be [absent from work][7];] [9] and

~~*Sixth*~~ *Fifth*, defendant [describe employment action taken, e.g., discharged]~~[9]~~[10] plaintiff; and

~~*Seventh*~~ *Sixth*, plaintiff's [absence from work][7] was a ~~motivating~~ determining[11] factor in defendant's decision to [describe employment action taken, e.g., discharge]~~[9]~~[10] plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved by [(the greater weight) or (a preponderance)][2] of the evidence, [or if defendant is entitled to a verdict under (Instruction _____)]~~[10]~~[12].

[You may find that plaintiff's [absence from work] was a ~~motivating~~ determining factor in defendant's (decision)[13] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] ~~not the true reason(s), but [(is) (are)]~~ a pretext to hide discrimination.] [14]

Employment Cases ~~-- Element and Damage Instructions~~

Notes on Use

Employment Cases ~~-- Element and Damage Instructions~~

1. This Instruction is for use in cases in which the employee's family member had a serious health condition. Instruction 5.81C should be used for cases in which the employee needed leave because of a birth, adoption or foster care.

2. Use this phrase if there are multiple defendants.

3. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See infra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. Insert the number of the Instruction defining "serious health condition."

6. Insert the number of the Instruction defining "needed to care for."

7. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

8. Insert the number of the Instruction defining "appropriate notice."

9. This element is bracketed because "appropriate notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

~~9~~ 10. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. ~~For example, the FMLA also protects employees who requested but were denied leave from retaliatory termination.~~ Insert the language that corresponds to the facts of the case.

11. See the Introduction for a discussion of whether the term "determining" factor or "motivating" factor should be used.

~~10~~ 12. This language should be used when the defendant is submitting an affirmative defense.

13. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

14. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist*., 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave if the employee is needed to care for the employee's spouse, son, daughter or parent with a serious health condition. The FMLA prohibits an employer from terminating an employee because the employee exercised rights or attempted to exercise rights under the FMLA. An employee who contends he or she was terminated because of FMLA leave, or a request to take FMLA leave, must show that the employer's action was motivated by discrimination because of the leave or request for leave. *Marks v. The School Dist. of Kansas City, Missouri*, 941 F. Supp. 886, 892 (W.D. Mo. 1996) (quoting *Day v. Excel Corp.*, 1996 WL 294341 (D. Kan. 1996)).

If plaintiff is alleging defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95 may be used.

5.81C FMLA – Wrongful Termination – Essential Elements (employee leave for birth, adoption or foster care[1])

Your verdict must be for the plaintiff [and against defendant _____][2] if all of the following elements have been proved by [(the greater weight) or (a preponderance)][3] of the evidence:

[*First*, plaintiff was eligible for leave[4]; and]

First, plaintiff was [absent from work][5] because of [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care][6]; and

[*Second*, plaintiff gave defendant appropriate notice (as defined in Instruction _____)[7] of [his/her] need to be [absent from work][5];] [8] and

Third, defendant [describe employment action taken, e.g., discharged][~~8~~ 9] plaintiff; and

Fourth, plaintiff's [absence from work][5] was a ~~motivating~~ determining[10] factor in defendant's decision to [describe employment action taken, e.g., discharge][~~8~~ 9] plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved by [(the greater weight) or (a preponderance)][2] of the evidence, [or if defendant is entitled to a verdict under (Instruction ____)][~~9~~ 11].

[You may find that plaintiff's [absence from work] was a ~~motivating~~ determining factor in defendant's (decision)[12] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] ~~not the true reason(s), but [(is) (are)]~~ a pretext to hide discrimination.] [13]

Notes on Use

1. This Instruction is for use in cases in which the employee needed leave because of a birth, adoption or foster care. Instruction 5.81B should be used for cases in which the employee's family member had a serious health condition. This Instruction differs from 5.81B in that it does not include an element requiring the plaintiff to show that he or she was "needed to care for" the newborn, adopted child or foster child. One of the purposes of the FMLA is to provide time for early parent-child bonding. 1993 U.S. Code Cong. and Admin. News 3, 11; 139 Cong. Rec. H 319, 384, 387, 396; *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.2d 68, 75 (Wis. 1992).

2. Use this phrase if there are multiple defendants.

3. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See infra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

6. Insert the language that corresponds to the facts of the case.

7. Insert the number of the Instruction defining "appropriate notice."

8. This element is bracketed because "appropriate notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

~~8~~ 9. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. ~~For example, the FMLA also protects employees who requested but were denied leave from retaliatory termination.~~ Insert the language that corresponds to the facts of the case.

10. See the Introduction for a discussion of whether the term "determining" factor or "motivating" factor should be used.

~~9~~ 11. This language should be used when the defendant is submitting an affirmative defense.

12. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

13. This sentence may be added, if appropriate. *See* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave for the birth of a son or daughter, or for placement with the employee of a son or daughter for adoption or foster care. 29 U.S.C. § 2612(a)(1)(A), (B); 29 C.F.R. § 825.112(a)(1), (2). The FMLA prohibits an employer from terminating an employee because the employee exercised rights or attempted to exercise rights

under the FMLA. An employee who contends that he or she was terminated because of FMLA leave, or a request to take FMLA leave, must show that the employer's action was motivated by discrimination because of the leave or request for leave. *Marks v. The School Dist. of Kansas City, Missouri*, 941 F. Supp. 886, 892 (W.D. Mo. 1996) (quoting *Day v. Excel Corp.*, 1996 WL 294341 (D. Kan. 1996)).

If plaintiff is alleging defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95 may be used.

5.81D FMLA – Failure to Reinstate – Essential Elements (employee with a serious health condition)

Your verdict must be for the plaintiff [and against defendant _____][1] if all of the following elements have been proved by [(the greater weight) or (a preponderance)][2] of the evidence:

[*First*, plaintiff was eligible for leave[3]; and]

~~*First*, plaintiff had [specify condition];~~

~~*Second*, [specify condition] was~~ *First*, plaintiff had a serious health condition (as defined in Instruction _____)[4]; and

~~*Third*~~ *Second*, plaintiff was absent from work because of that serious health condition; and

~~*Fourth*~~*Third*, plaintiff received treatment and was able to return to work and perform the functions of [his/her] job ~~prior to~~ at the expiration of the leave period; [5] and

~~*Fifth*~~*Fourth*, defendant refused to reinstate plaintiff to the same or an equivalent position (as defined in Instruction _____)[5] [6]held by plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved by [(the greater weight) or (a preponderance)][2] of the evidence, [or if defendant is entitled to a verdict under (Instruction ____)][6-7].

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted which corresponds to the burden-of- proof instruction given.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See infra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "serious health condition."

5. Define the "leave period" or use the date of the expiration of the leave period.

~~5~~ 6. Insert the number of the Instruction defining "equivalent position."

~~6~~ 7. This language should be used when the defendant is submitting an affirmative defense.

Committee Comments

The FMLA entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614; 29 C.F.R. § 825.214; *McGraw v. Sears, Roebuck & Co*., 21 F. Supp. 2d 1017 (D. Minn. 1998).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Id. See* Instruction 5.84A.

If plaintiff is alleging defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95 may be used.

5.81E FMLA – Failure to Reinstate -- Essential Elements (employee needed to care for a spouse, son or daughter with a serious health condition[1])

Your verdict must be for the plaintiff [and against defendant _____)[2] if all of the following elements have been proved by [(the greater weight) or (a preponderance)][3] of the evidence:

[*First*, plaintiff was eligible for leave[4]; and]

~~*First*, plaintiff's [identify family member] had [specify condition];~~

~~*Second*, [specify condition] was~~ *First*, plaintiff's [identify family member] had a serious health condition (as defined in Instruction _____)[5];and

~~*Third*~~ *Second*, plaintiff was needed to care for (as defined in Instruction _____)[6] [his/her] [identify family member] because of that serious health condition; and

~~*Fourth*~~ *Third*, plaintiff was absent from work because [he/she] was caring for [his/her] [identify family member] with the serious health condition; and

~~*Fifth*~~ *Fourth*, plaintiff was able to return to [his/her] job ~~prior to~~ at the expiration of the leave period; and

~~*Sixth*~~ *Fifth*, defendant refused to reinstate plaintiff to the same or an equivalent position (as defined by Instruction _____)[7] held by plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved by [(the greater weight) or (a preponderance)][3] of the evidence, [or if defendant is entitled to a verdict under (Instruction _____)][8].

Notes on Use

1. This Instruction is for use in cases in which the employee's family member had a serious health condition. Instruction 5.81F should be used for cases in which the employee needed leave because of a birth, adoption or foster care.

2. Use this phrase if there are multiple defendants.

3. The bracketed language should be inserted which corresponds to the burden-of- proof instruction given.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See infra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. Insert the number of the Instruction defining "serious health condition."

6. Insert the number of the Instruction defining "needed to care for."

7. Insert the number of the Instruction defining "equivalent position."

8. This language should be used when the defendant is submitting an affirmative defense.

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave if the employee is needed to care for the employee's spouse, son, daughter or parent with a serious health condition. The FMLA also entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614; 29 C.F.R. § 825.214; *McGraw v. Sears, Roebuck & Co*., 21 F. Supp. 2d 1017 (D. Minn. 1998).

~~The court may wish to define the phrase "equivalent position." According to the FMLA regulations, an "equivalent position" means a position that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. 29 C.F.R. § 825.215(a). It must involve the same or substantially similar duties or responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. *Id.*~~

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Id. See* Instruction 5.84A.

If plaintiff is alleging defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95 may be used.

5.81F FMLA – Failure to Reinstate -- Essential Elements (employee leave for birth, adoption or foster care[1])

Your verdict must be for the plaintiff [and against defendant_____)[2] if all of the following elements have been proved by [(the greater weight) or (a preponderance)][3] of the evidence:

[*First*, plaintiff was eligible for leave[4]; and]

First, plaintiff was absent from work because of [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care][5]; and

Second, plaintiff was able to return to [his/her] job ~~prior to~~ at the expiration of the leave period; [6] and

Third, defendant refused to reinstate plaintiff to the same or an equivalent position (as defined by Instruction _____) [6-7] held by plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved by [(the greater weight) or (a preponderance)][3] of the evidence, [or if defendant is entitled to a verdict under (Instruction _____)] [7-8].

Notes on Use

1. This Instruction is for use in cases in which the employee needed leave because of a birth, adoption or foster care. Instruction 5.81E should be used for cases in which the employee's family member had a serious health condition. This Instruction differs from 5.81E in that it does not include an element requiring the plaintiff to show that he or she was "needed to care for" the newborn, adopted child or foster child. One of the purposes of the FMLA is to provide time for early parent-child bonding. 1993 U.S. Code Cong. and Admin. News 3, 11; 139 Cong. Rec. H 319, 384, 387, 396; *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.2d 68, 75 (Wis. 1992).

2. Use this phrase if there are multiple defendants.

3. The bracketed language should be inserted which corresponds to the burden-of- proof instruction given.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See infra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. Insert the language that corresponds to the facts of the case.

6. Define the "leave period" or use the actual date of the expiration of the leave period.

~~6~~ 7. Insert the number of the Instruction defining "equivalent position."

~~7~~ 8. This language should be used when the defendant is submitting an affirmative defense.

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave for the birth of a son or daughter, or for placement with the employee of a son or daughter for adoption or foster care. The FMLA also entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614; 29 C.F.R. § 825.214; *McGraw v. Sears, Roebuck & Co*., 21 F. Supp. 2d 1017 (D. Minn. 1998).

~~The court may wish to define the phrase "equivalent position." According to the FMLA regulations, an "equivalent position" means a position that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. 29 C.F.R. § 825.215(a). It must involve the same or substantially similar duties or responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. *Id.*~~

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Id. See* Instruction 5.84A.

If plaintiff is alleging defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95 may be used.

5.82 FMLA – "Same Decision" Instruction

[If you find in favor of plaintiff under Instruction ____,[1] then you must answer the following question in the verdict form[s]: Has it been proved by [(the greater weight) or (a preponderance)][2] of the evidence that defendant would have [describe employment action taken, e.g., discharge][3] plaintiff even if defendant had not considered plaintiff's [absence from work][4].][5]

Notes on Use

1. Insert the number or title of the essential elements Instruction here.

2. Select the bracketed language that corresponds to the burden-of-proof Instruction given.

3. Select the language that corresponds to the facts of the case.

4. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

5. The case law is unclear whether the FMLA is to be treated like a Title VII case or like other civil rights cases. In a Title VII case, there is special statutory language that a decision for plaintiff on the issue of liability, but in favor of defendant on the "same decision" question, results in a judgment for plaintiff but no actual damages. *See* 42 U.S.C. § 2000e-5(g)(2)(B). Plaintiff's remedies are limited to a declaratory judgment, injunction not including reinstatement or back pay and attorney fees and costs. If the FMLA is treated like other civil rights cases, defendant prevails if the judgment is in favor of defendant on the "same decision" question.

Committee Comments

Until there is case law to the contrary, it is the Committee's position that a defendant may avoid liability in an FMLA case if it convinces a jury that the plaintiff would have suffered the same adverse employment action even if he or she had not taken or requested FMLA leave.

~~While the case law construing "same decision" analysis under the FMLA is sparse, it is likely that courts will determine that a defendant will avoid liability under the FMLA if it convinces a jury that the plaintiff would have suffered the same adverse employment action even if he or she had not taken or requested FMLA leave. *See Peters v. Community Action Comm.*, 977 F. Supp. 1428, 1434 (M.D. Ala. 1997) (defendant can avoid liability in an FMLA case only by proving that it would have made the same decision even if it had not allowed such discrimination). Courts have repeatedly looked to cases construing the Fair Labor Standards Act (FLSA) for guidance in construing the FMLA. *See e.g. Morris v. VCW, Inc.*, 1996 WL 740544 (W.D. Mo. 1996). In retaliation cases under the FLSA,~~

courts have determined that a plaintiff cannot prevail if the defendant can show that he or she would have been terminated regardless of the FLSA activity. *See e.g. McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996); *Reich v. Davis*, 50 F.3d 962 (11th Cir. 1995).

This result is different than cases under the Americans With Disabilities Act (ADA), which adopted Title VII remedies. *See Doane v. City of Omaha*, 115 F.3d 624, 629 (8th Cir. 1997); *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995).

5.83A FMLA – Definition: "Needed to Care For"

An employee is "needed to care for" a spouse, son, daughter or parent with a serious health condition (as defined in Instruction _____)[1] when the family member is unable to care for his or her own basic medical, hygienic or nutritional needs or safety; or is unable to transport himself or herself to the doctor. [The phrase also includes providing psychological comfort and reassurance which would be beneficial to a family member with a serious health condition (as defined in Instruction _____)[1] who is receiving inpatient or home care. The phrase also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.[2]]

Notes on Use

1. Insert the number of the Instruction defining "serious health condition."

2. The definition of "needed to care for" is more expansive than it first appears for it includes situations in which the employee's presence or assistance would provide psychological comfort or assurance to a family member, and instances in which the employee may need to make arrangements for care. In cases in which any of these situations are applicable, this Instruction should be modified to include the additional definition(s). *See* 29 C.F.R. § 825.116(a), (b).

Committee Comments

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.116(a)-(b).

5.83B FMLA – Definition: "Serious Health Condition"

A "serious health condition" means an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital, hospice, or residential medical care facility, or 2) continuing treatment by a health care provider (as defined in Instruction _____)[1].

Notes on Use

1. Insert the number of the Instruction defining "health care provider."

Committee Comments

This relatively brief definition is the statutory definition. 29 U.S.C. § 2611(11). A more detailed definition is supplied by the FMLA regulations and included as an alternate definition in these model instructions. 29 C.F.R. § 825.114. *See infra* Model Instruction 5.83C.

5.83C FMLA — Definition: "Serious Health Condition" (alternate)

The phrase a "serious health condition" as used in these instructions means an illness, injury, impairment, or physical or mental condition that involves:

[Inpatient care (for example, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities), or any subsequent treatment in connection with the inpatient care)];

OR

[Incapacity plus treatment, which means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive days, including any subsequent treatment or period of incapacity relating to the same condition, that <u>also</u> involves:

1) Treatment two or more times by a health care provider (as defined in Instruction _____)[1], by a nurse or physician's assistant under direct supervision of a health care provider (as defined in Instruction _____)[1], or by a provider of health services (for example, a physical therapist) under orders of, or on referral by, a health care provider (as defined in Instruction _____)[1]; or

2) Treatment by a health care provider (as defined in Instruction _____)[1]on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider (as defined in Instruction _____)[1]];

OR

[Any period of incapacity (inability to work, attend school or perform other regular daily activities) due to pregnancy or for prenatal care];

OR

[A chronic health condition, which means a condition which requires periodic visits for treatment by a health care provider (as defined in Instruction _____)[1], or by a nurse or physician's assistant under direct supervision of a health care provider (as defined in Instruction _____)[1], which continues over an extended period of time (including recurring episodes of a single underlying

condition), and may cause episodes of incapacity (inability to work, attend school or perform other regular daily activities) rather than continuing incapacity];

OR

[A period of incapacity (inability to work, attend school or perform other regular daily activities) which is permanent or long-term due to a condition for which treatment may not be effective, but requires continuing supervision of a health care provider (as defined in Instruction _____)[1], even though the patient may not be receiving active treatment];

OR

[Any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider (as defined in Instruction _____)[1], or by a provider of health care services under orders of, or on referral by, a health care provider (as defined in Instruction _____)[1], either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days in the absence of medical intervention or treatment.][1]

Notes to Use

1. Select the language that corresponds to the facts of the case. Within each optional definition, the language also may need to be adjusted on a case-by-case basis due to varying facts. For example, the court may wish to delete the language "or by a nurse or physician's assistant under direct supervision of a health care provider" if the facts of the case do not indicate that treatment was provided by someone other than the health care provider.

Committee Comments

This instruction is based on the definition of "serious health condition" as set forth in the FMLA regulations at 29 C.F.R. § 825.114. *See* comments regarding Instruction 5.80 for further discussion of the definition of a serious health condition.

5.83D FMLA — Definition: "Health Care Provider"

As used in these instructions the phrase "health care provider" includes [doctor of medicine, doctor of osteopathy, podiatrist, dentist, clinical psychologist, optometrist, nurse practitioner, nurse-midwife, or clinical social worker][1], so long as the provider is authorized to practice in the State and is performing within the scope of his or her practice.

Notes on Use

1. The bracketed language is not exhaustive of the types of health care workers who can meet the regulatory definition of a health care provider. For a full discussion, see the Committee Comments, ~~*infra*~~ *supra*. Insert the appropriate language to include the type of health provider(s) relevant to the case.

Committee Comments

The FMLA defines "health care provider" as:

> (A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
>
> (B) any other person determined by the Secretary [of Labor] to be capable of providing health care services.

29 C.F.R. § 825.118.

The regulations promulgated by the Department of Labor defined additional persons "capable of providing health care services" to include the workers described in the model Instruction as well as 1) chiropractors, if treatment is limited to "manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist;" 2) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; 3) any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and 4) a health care provider who falls within one of the specifically mentioned categories who practices in a country other than the United States, so long as he or she is authorized to practice in accordance with the law of that country and is performing with the scope of his or her practice. The regulations state that "authorized to practice in the State" means that the health care provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider. 29 C.F.R. § 825.118.

5.83E FMLA — Definition: "Appropriate Notice" – Leave Foreseeable [1]

The phrase "appropriate notice" as used in these instructions means that [he/she] must have notified defendant of [his/her] need for leave at least 30 days before the leave was to begin.

Notes on Use

1. This Instruction should be used in situations where plaintiff's need for leave was foreseeable.

Committee Comments

The FMLA requires that employees provide adequate notice to their employers of the need to take leave. If the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, an employee must give the employer at least 30 days advance notice before the leave is to begin. 29 C.F.R. § 825.302(a). *See also Bailey v. Amsted*, 172 F.3d 1041 (8th Cir. 1999). An employee need not invoke the FMLA by name in order to put an employer on notice that the FMLA may have relevance to the employee's absence from work. *Thorson v. Gemini*, 205 F.3d 370, 381 (8th Cir. 2000). ~~The employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave. *Id.*~~ *Nelson v. Arkansas Pediatric Facility*, 2001 WL 13291 (8th Cir. (Ark)). The adequacy of the notice in an FMLA context is a fact issue, not a question of law. *Sanders v. May Dept. Stores Co.*, 2003 WL 61112, at *4 (8th Cir. (Mo)).

The FMLA also requires an employer to give appropriate notice. Whether an employer has satisfied its notice requirements is a jury issue. *Sanders*, 2003 WL 61112, at *4. The employer must post a notice concerning the Act. 29 C.F.R. § 825.300(a). In addition, the employer must give written notice of an employee's rights under the Act after the employee has given appropriate notice to the employer of the need for leave. 29 C.F.R. § 825.301(c); *Sanders*, 2003 WL 61112, at *4.

5.83F FMLA — Definition: "Appropriate Notice" – Leave Unforeseeable [1]

The phrase "appropriate notice" as used in these instructions means that [he/she] must have notified defendant of [his/her] need for leave as soon as practicable after [he/she] learned of the need to take leave.

Notes on Use

1. This Instruction should be used in situations where plaintiff's need for leave was unforeseeable.

Committee Comments

The FMLA requires that employees provide adequate notice to their employers of the need to take leave. In the case of unexpected absences where 30 days advance notice is not possible, the regulations require the employee to give the employee notice "as soon as practicable." 29 C.F.R. § 825.302(a). *See also Bailey v. Amsted*, 172 F.3d 1041 (8th Cir. 1999). The regulations further state that ordinarily "as soon as practicable" requires the employee to give at least verbal notification within one or two business days after the employee learns of the need for leave. 29 C.F.R. § 825.302(b). *See also Browning v. Liberty Mutual Insurance Company*, 178 F.3d 1043, 1049 (8th Cir. 1999); *Carter v. Ford Motor Co.*, 121 F.3d 1146 (8th Cir. 1997). An employee need not invoke the FMLA by name in order to put an employer on notice that the FMLA may have relevance to the employee's absence from work. *Thorson v. Gemini*, 205 F.3d 370, 381 (8th Cir. 2000). ~~The employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave. *Id.* Nelson v. Arkansas Pediatric Facility~~, 2001 WL 13291 (8th Cir. (Ark)). The adequacy of the notice in an FMLA context is a fact issue, not a question of law. *Sanders v. May Dept. Stores Co.*, 2003 WL 61112, at *4 (8th Cir. (Mo)).

The FMLA also requires an employer to give appropriate notice. Whether an employer has satisfied its notice requirements is a jury issue. *Sanders*, 2003 WL 61112, at *4. The employer must post a notice concerning the Act. 29 C.F.R. § 825.300(a). In addition, the employer must give written notice of an employee's rights under the Act after the employee has given appropriate notice to the employer of the need for leave. 29 C.F.R. § 825.301(c); *Sanders*, 2003 WL 61112, at *4.

5.83G FMLA — Definition: "Equivalent Position"

An "equivalent position" means a position that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties or responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

Committee Comments

This definition is taken from the FMLA regulations at 29 C.F.R. § 825.215(a). This is somewhat different than the approach taken by the ADA. An ADA plaintiff must demonstrate that he or she is unable to work in a broad range of jobs to show that he or she is unable to perform the major life activity of working and is, therefore, disabled for purposes of the ADA; a plaintiff who shows only an inability to perform his or her own job has not, therefore, made a showing of disability sufficient to entitle him or her to the protections of the ADA. 29 C.F.R. § 1630.2(j)(3)(i). However, a demonstration that an employee is unable to work in his or her job due to a serious health condition is enough to show the employee is incapacitated for purposes of the FMLA. 29 C.F.R. § 825.702(b); *Steckloff v. St. John's Mercy Health Systems*, 218 F.3d 858, 861 (8th Cir. 2000).

5.84 FMLA – Exception to Job Restoration (key employee)

Your verdict must be for the defendant if it has been proved by [(the greater weight) or (a preponderance)][1] of the evidence that plaintiff was a key employee and that denying job restoration to plaintiff was necessary to prevent substantial and grievous economic injury to the operations of the employer. In considering whether or not plaintiff was a key employee you may consider factors such as whether the employer could replace the employee on a temporary basis, whether the employer could temporarily do without the employee, and the cost of reinstating the employee.

Notes on Use

1. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

Committee Comments

An employer may deny job restoration to a "key employee" if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 C.F.R. § 825.216(c). In determining what constitutes a substantial and grievous economic injury, the focus should be on the extent of the injury to the employer's operations, not whether the absence of the employee will cause the injury. 29 C.F.R. § 825.218(a). This standard is different and more stringent than the "undue hardship" test under the Americans with Disabilities Act. 29 C.F.R. § 825.218(d). While a precise definition is not provided in the regulations, factors to consider in making that determination are provided at 29 C.F.R. § 825.218(b). They include whether the employer could replace the employee on a temporary basis, whether the employer could temporarily do without the employee, and the cost of reinstating the employee. *Id.*

The court may wish to define "key employee," which is defined by FMLA regulation as a salaried employee who is eligible to take FMLA leave and who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employer's worksite. 29 C.F.R. § 825.217(a). The method of determining whether the employee is "among the highest paid 10 percent" is described in the FMLA regulations. 29 C.F.R. § 825.217(c). No more than 10 percent of the employer's employees within 75 miles of the worksite may be "key employees." 29 C.F.R. § 825.217(c)(2). The term "salaried" has the same meaning under the FMLA as it does under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, as amended. 29 C.F.R. § 825.217(b), 29 C.F.R. § 541.118.

5.84A FMLA – Exception to Job Restoration (employee would not have been employed at time of reinstatement)

Your verdict must be for the defendant if it has been proved by [(the greater weight) or (a preponderance)][1] of the evidence that plaintiff would not have been employed by the defendant at the time job reinstatement was requested.

Notes on Use

1. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

Committee Comments

An employer is not required to provide an employee returning from medical leave "any right, benefit or position of employment other than the right, benefit or position to which the employee would have been entitled had the employee never taken leave." 29 U.S.C. § 2614(a)(3)(B); *Marks v. The School Dist. of Kansas City, Mo*., 941 F. Supp. 886, 892 (W.D. Mo. 1996). Thus, an employee is not entitled to job reinstatement after FMLA leave if the employer can show that the employee would not otherwise have been employed at the time reinstatement is requested. 29 C.F.R. § 825.216(a). For example, an employer is not required to reinstate an employee who was laid off during the course of taking FMLA leave. 29 C.F.R. § 825.216(a)(1).

5.85 FMLA – Actual Damages

If you find in favor of plaintiff under Instruction ____[1] then you must award plaintiff the amount of any wages, salary, and employment benefits plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge] through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by plaintiff during that time.

[You are also instructed that plaintiff has a duty under the law to "mitigate" [his/her] damages – that is, to exercise reasonable diligence under the circumstances to minimize [his/her] damages. Therefore, if you find by [(the greater weight) or (a preponderance)][2] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [his/her], you must reduce [his/her] damaged by the amount [he/she] reasonably could have avoided if [he/she] had sought out or taken advantage of such an opportunity.][3]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][4]

Notes on Use

1. Insert the number or title of the essential elements instruction here.

2. The bracketed language should be inserted which corresponds to the burden-of- proof Instruction given.

3. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002); *Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983); *Fieldler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982).

4. This paragraph may be given at the trial court's discretion.

Committee Comments

The FMLA provides that a prevailing plaintiff is entitled to recover actual damages and interest thereon plus an additional equal amount as liquidated damages. 29 U.S.C. § 2617(a)(1); 29 C.F.R. § 825.400(c); *Morris v. VCW, Inc*., 1996 WL 740544 (W.D. Mo. 1996). In *Morris*, the court held

that an employee could not recover interest because she failed to present evidence at trial regarding the method of calculating the amount of interest. *Id.* at *16.

Where a prevailing plaintiff has not lost wages, salary or employment benefits, he or she may be entitled to other compensation. 29 U.S.C. § 2617, 29 C.F.R. § 825.400(c). For example, an employee who was denied FMLA leave may be able to recover any monetary losses incurred as a direct result of the FMLA violation, such as the cost of providing for a family member, up to an amount equal to 12 weeks of wages or salary for the employee. 29 U.S.C. § 2617(a)(1).

In the Eighth Circuit, damages for emotional distress have been approved. See Duty v. Norton-Alcoa Proppants, 293 F.3d 481, 496 (8th Cir. 2002) (approving compensatory damages for mental distress (citing Frazier v. Iowa Beef Processors, Inc., 200 F.3d 1190 (8th Cir. 2000) (approving mental distress damages under Iowa Public Policy)). But see Koch v. St. Francis Med. Center, 2002 WL 32063336 (E.D. Mo.) (stating it is not clear whether Duty awarded damages for mental distress under Arkansas Civil Rights Act or the FMLA); Keene v. Rinaldi, 127 F. Supp. 2d 770 (M.D.N.C. 2000).

5.86 FMLA – Good Faith Defense to Liquidated Damages

If you find in favor of plaintiff under Instruction _____[1], then you must decide whether defendant acted in good faith. You must find defendant acted in good faith if you find by [(the greater weight) or a (preponderance)][2] of the evidence that when defendant [insert defendant's act or omission], defendant reasonably believed that its actions complied with the Family and Medical Leave Act.

Notes on Use

1. Insert the number or title of the essential elements Instruction here.

2. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

Committee Comments

A prevailing plaintiff in an FMLA case is entitled to liquidated damages in an amount equal to actual damages plus interest. 29.U.S.C. § 2617(a)(1); 29 C.F.R. § 825.401(c); *Morris v. VCW, Inc.*, 1996 WL 740544 (W.D. Mo. 1996). In *Morris*, the United States District Court for the Western District of Missouri looked to case law under the Fair Labor Standards Act to determine whether plaintiff was entitled to liquidated damages. *Id.* at ~~*5-6~~ *2 (the statutory relief provided by the FMLA's liquidated damage provision "parallels the provisions of the FLSA." S. Rep. No. 103-3 at 35; *compare* 29 U.S.C. § 216(b) *with* 29 U.S.C. § 2617(a)(1)).

The language for this Instruction is based on the court's analysis of the good-faith defense in *Morris*, 1996 ~~U.S. Dist. LEXIS 19201 at *8-10~~ WL 740544, at *3. The FMLA allows an employer ~~may~~ to avoid the imposition of liquidated damages if it can show that its act or omission was made in good faith and that it had reasonable grounds for believing it was acting in accordance with the FMLA. 29.U.S.C. § 2617(a)(1)(A)(iii). *Morris* describes it as "subjective good faith" and an "objective reasonable belief" its conduct did not violate the law. *Id.* at *3. Good faith requires some duty on the part of the employer to investigate potential liability under the FMLA. *Morris*, 1996 ~~U.S. Dist. LEXIS 19201 at *10~~ WL 740544, at *3.

5.87 FMLA - Verdict Form

Note: Complete the following paragraph by writing in the name required by your verdict.

On the [violation of the FMLA] [1] claim of plaintiff [John Doe], [as submitted in Instruction _____] [2], we find in favor of:

_____

(Plaintiff John Doe) or (Defendant XYZ, Inc.)

Note: Answer the next question only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved by the [(greater weight) (preponderance)] [3] of the evidence that defendant would have (describe employment action taken, e.g., discharged) [4] plaintiff regardless of [his/her] (exercise of [his/her] rights under the FMLA)? [5]

_____ Yes _____ No

(Mark an "X" in the appropriate space.)

Note: Complete the following paragraph only if your answer to the preceding question is "no." If you answered "yes" to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We find plaintiff's damages [, other than for emotional distress] [6] to be:

$_____ (stating the amount or, if none, write the word ("none").

[We find plaintiff's damages for emotional distress to be:

$_____ (stating the amount, if none, write the word ("none").

_____

Foreperson

Employment Cases ~~-- Element and Damage Instructions~~

Dated: _____

Notes on Use

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

2. The number or title of the "essential elements" instruction may be inserted here. *See infra* Model Instructions 5.81 A-F.

3. Select the bracketed language that corresponds to the burden-of-proof instruction given.

4. Select the language that corresponds to the facts of the case.

5. This question submits the "same decision" issue to the jury. *See infra* Model Instruction 5.82.

6. As noted infra in the Committee Comments to Model Instruction 5.85, the issue of whether damages for emotional distress will be allowed under the FMLA is not completely resolved. The bracketed language may be used if there is evidence of emotional distress. These damages are segregated from plaintiff's other damages in the verdict form in order to avoid the need for retrial if the issue is resolved in the negative. See Hibbs, 583 U.S. at ___, 2003 WL 21210426 at *9 describing the many limitations placed on the scope of the FMLA by Congress.

5.91 - DISPARATE TREATMENT - ESSENTIAL ELEMENTS (Motivating Factor/Same Decision)

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's age discrimination claim][2] if all the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, defendant [discharged][4] plaintiff; and

Second, plaintiff's (age) [was a motivating factor][5] played in part][6] in defendant's decision.

However, your verdict must be for defendant if any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, or if it has been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have [discharged] plaintiff regardless of [his/her] (age).

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

4. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

5. The Committee believes that the phrase "motivating factor" should be defined. *See infra* Model Instruction 5.96.

6. *See* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

Committee Comments

~~* For a pretext case, the format of Model Instruction 5.91, *infra*, is recommended.~~

~~This instruction is designed to submit the issue of liability in "disparate treatment" cases brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994). The burden-shifting analysis used in this instruction had been adopted by the Supreme Court in "mixed motive"~~

cases under both Title VII and 42 U.S.C. § 1983. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977). Moreover, a similar burden-shifting approach has been legislatively adopted in all Title VII cases by virtue of the Civil Rights Act of 1991. *See* Introductory Note to Section 5.

To be sure, there is an important difference between Title VII cases and ADEA cases in the use of this format. In Title VII cases, the plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor" in the challenged employment decision, and a finding that the employer would have made the "same decision" in the absence of any discriminatory motive precludes an award of damages or reinstatement, but does not preclude an award of attorney fees or equitable relief. 42 U.S.C. § 2000e-2(m). It is unclear whether the same result would occur in an age discrimination case. *See Fast v. Southern Union Co., Inc.*, 149 F.3d 885, 889 (8th Cir. 1998) and *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999) (same) (citing *Fast*).

At the court's option, a short statement which defines the Age Discrimination in Employment Act may be included at the beginning of this instruction or as a separate instruction. The following language, based on *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985), is recommended:

> Under the Age Discrimination in Employment Act, it is unlawful for an employer to make an employment decision on the basis of an individual's age when that individual is 40 years of age or older.

5.95 PRETEXT INSTRUCTION

You may find that plaintiff's (age) (race) (sex)[1] was a [motivating] [determining][2] factor in defendant's (decision)[~~2~~ 3] if it has been proved by the [(greater weight) (preponderance)][~~3~~ 4] of the evidence that defendant's stated reason(s) for its (decision) ~~[(is) (are)] not the true reason(s), but~~ [(is) (are)] a pretext to hide [(age) ~~(gender)~~ (sex) (race)] discrimination. [5]

Notes on Use

1. ~~This term must be modified if the plaintiff alleges discrimination on the basis of race, gender, or some other prohibited factor.~~ Choose the appropriate word.

2. Choose the same word as used in the elements instruction.

~~2~~ 3. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

~~3~~ 4. Select the bracketed language which corresponds to the burden-of-proof instruction given.

5. *See Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.".

Committee Comments

Plaintiffs can establish unlawful bias through "either direct evidence of discrimination *or* evidence that the reasons given for the adverse action are a pretext to cloak the discriminatory motive." *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1063 (8th Cir. 1988) (emphasis added). "[A]n employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988). This instruction, which is based on *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), may be used in conjunction with the essential elements instruction when the plaintiff relies substantially or exclusively on "indirect evidence" of discrimination. In an attempt to clarify this standard, the Eighth Circuit, in *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997), stated:

> In sum, when the employer produces a nondiscriminatory reason for its actions, the prima facie case no longer creates a legal presumption of unlawful discrimination. The *elements* of the prima facie case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find

> for the plaintiff. This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination.

Id. at 837 (footnote omitted).

The Committee believes pretext evidence can support a jury decision when either a motivating or determining factor is required. *Ryther v. KARE II*, 864 F. Supp. 1510, 1521 (D. Minn. 1994) and *Ryther v. KARE*, 108 F.3d 832 (8th Cir. 1997).